EIS Brake Parts, Division of Standard Motor Products *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 376. Cases 34–CA–7107–1, 34–CA–7130, 34–CA–7201–1, 34–CA–7229–1, 34–CA–7237, and 34–CA–7304

August 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On October 31, 1997, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed limited cross-exceptions and a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) unilaterally increasing substantially the amount of subcontracting of work normally performed by unit employees and laying off unit employees as a result of that subcontracting; (2) implementing its last contract proposals, including its proposal for a group incentive bonus plan,[2] without having reached a lawful impasse in collective-bargaining negotiations;[3] and, (3) refusing to provide the Union access to its facility for a safety and health inspection.

As explained below, however, we reverse the judge's unfair labor practice findings regarding the Respondent's unilateral combination of job classifications and creation of a CNC Cell in the wheel cylinder department and combination of job classifications in the subassembly department; provision of Gatorade to employees in working areas; and provision of free pizza to reward employees in the hose assembly area for achieving 100-percent productivity. We also find merit in the General Counsel's cross-exceptions requesting clarification of specific provisions contained in the judge's recommended remedy, Order, and notice, and modify those provisions accordingly.

1. On or about August 25, 1995, Focus Factory Manager Steve Levack informed Local Union President Lockhart that the Respondent would be combining certain jobs in the subassembly department.[4] Lockhart protested that the "company couldn't do that, and should negotiate with the Union about combining any jobs." The Respondent nonetheless proceeded with the job combination.[5] On August 31, 1995, the Union filed a grievance regarding the Respondent's practice of "continually changing job descriptions, combining jobs, and posting them as setup operator positions without bargaining the impact of other employees in the classification." In response to the grievance, the Respondent asserted that it was following "both the contract and past practice in job combination."

About October 9, 1995, Plant Superintendent Scott McGregor informed Lockhart of a new "experimental" job combination and creation of a CNC Cell in the wheel cylinder department. Once again, the Union protested the combination, the Respondent proceeded to implement it, and the Union filed a grievance over the change. However, after 10 days of operation under the wheel cylinder job combination, the Respondent concluded that the combination was unsuccessful, discontinued it, and reverted to the status quo ante. Thus, in effect, the Union's grievance over this job combination became moot; and, in fact, the Union did not further process its grievance.[6]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that the judge's decision evidences bias and prejudice. Upon our full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis and discussion of the evidence.

[2] We find merit in the General Counsel's exception to the judge's inadvertent failure to include a specific remedy for any unit employees who have been warned, suspended, reassigned, discharged, or otherwise disciplined for failure to achieve standards under the new group incentive bonus system. We shall order the Respondent to rescind such unlawful discipline; and we shall modify the Order and notice accordingly.

[3] Having adopted the judge's finding that the parties had not reached a valid impasse in their collective-bargaining negotiations when the Respondent unlawfully implemented its last contract offer, including its proposed group incentive bonus plan, in reaching our decision we find it unnecessary to rely, as did the judge, on *McClatchey Newspapers, Inc.*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 118 S. Ct. 2341 (1998).

In agreeing with the judge that the Respondent unilaterally subcontracted work, laid off employees, and implemented the group incentive bonus plan in violation of Sec. 8(a)(5) and (1), we note that the judge found that the Union did not waive its bargaining rights concerning those issues. We also note that the Respondent does not specifically except to the judge's finding on the waiver issue and does not argue waiver on brief to the Board. We thus adopt the finding pro forma.

[4] Thus, the events at issue arose following the expiration of the parties collective-bargaining agreement on June 1, 1995, and the Respondent's unlawful implementation of its final contract offer on June 26, 1995.

[5] As noted above, this combination operated satisfactorily and ultimately became permanent.

[6] The Union requested that its grievance regarding the wheel cylinder job combination be placed "on hold." The Respondent responded that, if there were no further action on the grievance within 30 days, the Respondent would consider the matter settled or withdrawn.

The management-rights clause of the parties' expired collective-bargaining agreement gave the Respondent the exclusive right "to introduce new or improved production methods." Article 12.E of that agreement spelled out the procedure to be followed in establishing a new or combined job, i.e., the Company must provide a copy of the new job description to the Union, and the Union has 30 days to grieve the job classification and its slotting in the established labor grade scale. Indeed, Lockhart confirmed at the instant hearing that the parties had a practice of "see[ing] how the new jobs operated and discuss[ing] the matter after the fact." The record shows that in the past, when the Respondent wanted to combine jobs, it would notify the Union and then implement the combination. The Union's time study engineer would observe the job combination in operation. Thereafter, the Union would grieve the combination if it thought there was a "problem." The parties followed this process for both the subassembly and wheel cylinder job combinations at issue here.

When the Respondent notified the Union of its intention to combine jobs in the subassembly department, Personnel Manager John Geoffrion informed Lockhart that about seven unit employees would be affected by the combination, and that only three or four employees would be needed after the combination was accomplished. However, at the hearing in the instant case, Lockhart conceded that ultimately no employees were affected when the subassembly job combination was fully implemented.[7] Record evidence shows that the Union pursued its grievance regarding the subassembly combination through step 3. At step 3, the Respondent asserted that

> [t]he Company has followed both the contract and past practice. When we have created a new job, we have given a copy of the job description and labor grade to the Union as per the contract. If there are no employees affected, the job is posted. If there are employees affected, we have followed the agreed upon practice of offering the senior employees affected by a new job the opportunity to fill that job first before we post it.

The Union did not further pursue its grievance.

When the Respondent notified the Union of its intent to combine jobs and create a CNC Cell in the wheel cylinder department, Personnel Manager John Geoffrion told Union Agent Lockhart that it was undertaking the combination on "an experimental basis," as a "potential change," and that the Respondent did "not yet know what would happen or if it will actually work." As noted, the Respondent found the wheel cylinder job combination unsuccessful and discontinued it. On the return of wheel cylinder operators to their preexperiment form, the Union's grievance was settled or withdrawn before negotiations could take place.

Applying *Our Lady of Lourdes Health Care Center*, 306 NLRB 337, 339–340 (1992), the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally combining jobs in the subassembly and wheel cylinder departments. In *Our Lady of Lourdes*, the Board found a violation. However, in doing so, the Board noted that an employer may make unilateral changes in an expired contract where the changes were contemplated by the quoted provision of the contract and are "a mere continuation of the status quo." In *Our Lady of Lourdes*, the Board found a violation pursuant to that test.

Here, the judge reasoned that the parties had not attempted to modify the management-rights clause of their collective-bargaining agreement during negotiations, and that the terms of the management-rights clause in their expired collective-bargaining agreement survived as terms and conditions of employment.[8] He found that, although the management-rights clause of the expired contract gives the Respondent the right "to introduce new or improved production methods," that language does not specifically spell out the details of any change that might be made. Thus, the judge concluded that the changes contemplated in the subassembly and wheel cylinder job combinations entailed the exercise of considerable discretion and were not "a mere continuation of the status quo," and, moreover, that the Union had not waived its right to bargain over the changes.

We agree with the judge that the test of *Our Lady of Lourdes* is controlling. However, we reach a different result. Contrary to the judge, we find that both the Respondent's combination of subassembly department jobs and its experimental, and ultimately abortive, combination of wheel cylinder department jobs were contemplated by the parties' bargaining agreement and constituted a lawful continuation of the status quo.

As set forth above, the "status quo," as understood by these parties for combining jobs, such as those at issue here, was defined by contract and well-established practice. The Respondent would give the Union notice of the desired job changes and activate the new jobs on line. The Union could file a grievance. Then, while the grievance was pending, the parties would "see how the new jobs operated and discuss the matter after the fact." Thus, the parties traditionally used the contractual grievance process as the mechanism for negotiations concern-

[7] On direct examination, Lockhart testified generally that employees were affected by the job combination. On cross-examination, Lockhart initially identified employees Marie LaStreana and Florence Dawes as having been affected by the job combination. When confronted by Respondent's counsel with evidence showing that LaStreana and Dawes were laid off on August 21, 1995, Lockhart conceded that those layoffs antedated the August 25 notice of the subassembly job combination and that the employees were not laid off as a result of the combination.

[8] *Sts. Mary & Elizabeth Hospital*, 282 NLRB 73, 78 fn. 1 (1986), enfd. 808 F.2d 1211 (6th Cir. 1987).

ing the establishment of new or combined jobs *after* the new jobs were in operation and the parties had had an opportunity to observe and analyze the effects of the combined jobs on production and on the unit employees. That is precisely the procedure followed by the parties in this case.

Regarding the subassembly job combination, the parties engaged in negotiations regarding the change. The fact that the negotiations occurred after the job combination was implemented was consistent with the parties' established practice. That is, the parties negotiated to ascertain the actual effect of the combination on operations and the impact of the change on employees. As noted by the Respondent in its stage-3 grievance response, no employees were affected by the subassembly department job combination.[9] The Respondent's remaining obligation, if no employees were affected, was to post the new jobs. Neither the Union nor the General Counsel has alleged that the Respondent failed to post the new jobs or that there were any irregularities in conjunction with the posting process.[10]

Accordingly, we find that the combination of jobs in the subassembly department meets the test set forth in *Our Lady of Lourdes*, supra. That is, past practice contemplated that the Respondent could introduce new or improved production methods like the job combination; and article 12.E established the procedure for making the change. The parties adhered to those procedures and, thus, "mere[ly] continued the status quo" following the expiration of the contract. The subassembly department job combination, thus, was lawful; and we reverse the judge's finding to the contrary.

For the same reasons, we reverse the judge's finding that the wheel cylinder department job combination and creation of a CNC Cell were unlawful. There, the Respondent notified the Union that it wanted to make the change "on an experimental basis" and unilaterally implemented the change. The Union filed a grievance to preserve its option to "discuss the matter after the fact." In other words, the parties continued the status quo by following their established procedure for combining jobs. No negotiations ultimately occurred regarding the wheel cylinder combination; however, this was because the Respondent voluntarily returned to the status quo. The lack of negotiations was not the result of a refusal by the Respondent to negotiate. Rather, the need to negotiate issues arising out of the "experimental" combination became moot when the Respondent discontinued the combination and returned the wheel cylinder department operation to its preexperiment form, before any unit employees could be affected. The Union recognized that the matter was moot by not processing its grievance.

Plainly, the Respondent's manner of conducting the wheel cylinder job combination was consistent with the parties' established practice. Further, there can be no clearer manifestation of maintenance of the status quo than the return of wheel cylinder operations to preexperiment form, after the experimental job combination proved unsuccessful. For these reasons, we find lawful the Respondent's experimental wheel cylinder job combination and dismiss the relevant complaint allegation.

2. We also reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) on specified dates in July 1995 by providing drinks (Gatorade)[11] to employees in working areas and granting a bonus meal (pizza) to employees in the hose assembly area to reward them for achieving 100-percent productivity.

The Respondent had a longstanding policy of restricting food and drinks on the plant floor. The weather had been unusually hot during the summer of 1995, and employees complained about high temperatures on the workfloor. At a July 20, 1995 meeting, the Joint company/union safety committee discussed the employees' heat-related complaints, including requests that cold drinks be provided on hot days. The judge found that matters relating to health and safety are subjects commonly discussed by the safety committee, and that loss of potassium on hot days was considered a health issue. The use of Gatorade to counter the ill effects on employee health was the Respondent's response to this concern.

Accordingly, the next day Operations Manager Mike Paulus informed Local Union President Lockhart that the Company would set up Gatorade stations on the plant floor when the temperature exceeded 90 degrees, but that the Respondent's general policy of restricting food and drinks would otherwise remain unchanged. Lockhart protested that he thought providing Gatorade was "a bad idea because it appeared to contradict the existing rule." Paulus responded that it was a safety issue.[12] The Respondent immediately announced and implemented its Gatorade policy.

Relying on *Stone Container Corp.*,[13] the judge found that the Gatorade policy related to terms and conditions of employment, i.e., a potential health risk. Accordingly, he found that the Respondent was not privileged to establish the policy unilaterally. Moreover, especially in view

[9] The judge implicitly found that no employees were affected.

[10] It is of no consequence, in the facts of this case, whether a management-rights clause, waiving the union's right to bargain, survives the expiration of a contract. In the instant case, the parties bargained, albeit after the change, and this was consistent with past practice.

[11] Gatorade is a brand-name beverage, which is touted as a source for replacing nutrients lost from the body through exertion and perspiration.

[12] According to Paulus, Lockhart did not seek to negotiate the issue and, in any case, no negotiations took place over the issue because, in his eyes, safety issues are not negotiable. The judge found that the record is unclear as to whether the parties engaged in "actual bargaining" over the Gatorade policy. In view of our disposition of the issue, infra, we do not find it necessary to resolve this evidentiary ambiguity.

[13] 313 NLRB 336 (1993).

of the Respondent's other serious unfair labor practices, the judge found that the provision of Gatorade to employees was not de minimis and was a benefit over which bargaining was required.

We disagree. There can be no doubt that issues regarding workplace health and safety—here, concerns about the health effect on employees excessive heat—are terms and conditions of employment and, thus, mandatory subjects of bargaining that cannot be unilaterally changed by an employer. We find that here, however, the development of the Respondent's "Gatorade policy" was a direct result of the parties' collective bargaining, e.g., their contractually established joint safety committee process. Employees' heat-related health and safety concerns were resolved through the efforts of the committee during a regular safety meeting. The General Counsel does not contend that the committee was an inappropriate forum for addressing the concerns. Thus, we find that the Respondent's institution of its Gatorade policy was consistent with its collective-bargaining obligation. In any case, we find that the effect on employees of the Respondent's implementation of this policy is at most de minimis. That is, it is narrowly tailored to address a specific health and safety concern, limited to instances involving clearly defined, extreme weather conditions, and otherwise expressly leaves undisturbed the Respondent's general prohibition against food and drink on the plant floor.[14]

We similarly find lawful the Respondent's decision to provide pizza to employees in the hose assembly area, in recognition of achievement of 100-percent productivity. It appears that the pizza lunch was a spontaneous offering after the fact, and not a "carrot" held out to employees to induce higher productivity. The record shows that the Respondent had a history of occasionally, and apparently randomly, giving small food items to employees in situations such as the completion of inventory and the achieving of departmental objectives.

The Board has found that an employer's occasionally providing small food items to employees in circumstances similar to those present here is not a sufficiently substantial benefit to constitute "terms and conditions of employment" for purposes of sustaining a violation of Section 8(a)(5). *Benchmark Industries*, 270 NLRB 22 (1984), affd. 760 F.2d 267 (5th Cir. 1985). Accordingly, we find that the Respondent's providing of pizza to the employees in the hose assembly fell within this rule. In addition, it was not dissimilar from prior conduct.

ORDER

The National Labor Relations Board orders that the Respondent, EIS Brake Parts, Division of Standard Motor Products, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing the terms and conditions of its last proposal for a collective-bargaining agreement.

(b) Unilaterally implementing a new group incentive bonus plan and warning, suspending, discharging, reassigning, or otherwise disciplining employees for failure to achieve standards under the group incentive bonus system.

(c) Unilaterally subcontracting work normally performed by unit employees since March 6, 1995, and laying off unit employees as a result of such subcontracting.

(d) Refusing the Union access to its facility for a safety and health inspection.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Union, rescind the terms and conditions of its last proposal for a new collective-bargaining agreement implemented by the Respondent on June 26, 1995, and the new group incentive bonus plan; reinstate the terms and conditions of employment which existed prior to this date; bargain with the Union in good faith until an agreement or impasse is reached; rescind any warnings, suspensions, discharges, reassignments, or other discipline issued to employees for failure to achieve standards under the group incentive bonus system; and make whole unit employees for any loss of earnings or benefits they may have suffered as a result of the Respondent's unlawful actions as set forth in the remedy section of the administrative law judge's decision.

(b) Rescind the decision to subcontract work normally performed by unit employees since about March 6, 1995, restore such work to them, and make them whole for any loss of earnings or benefits they may have suffered as a result of the Respondent's unlawful actions, as set forth in the remedy section of the administrative law judge's decision.

(c) Within 14 days of the date of this Order, offer unit employees who were laid off or discharged because of the Respondent's unlawful subcontracting of unit work immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to a substantially equivalent position without prejudice to their seniority or any other rights and privileges enjoyed; and make them whole for any loss of earnings or any other benefits suffered as a result of their layoff or discharge since March 6, 1995, in the manner set forth in the remedy section of the administrative law judge's decision.

(d) In the event the Respondent's unfair labor practices resulted in discipline, layoff, or discharge of employees, or other change in unit employees status, the Respondent

[14] In agreeing with this dismissal, Member Brame agrees that the implementation of the Gatorade policy was at most de minimus and he finds it unnecessary to decide whether it was also a direct result of the parties' collective bargaining.

shall make whole any affected employees for any loss of earnings or benefits they may have suffered because of the Respondent's unlawful actions in the manner set forth in the remedy section of the administrative law judge's decision and, within 14 days of this Order, offer such employees immediate reinstatement to their former jobs, if applicable, or if such jobs no longer exist to substantially equivalent positions without prejudice to their seniority or any other rights or privileges enjoyed by them.

(e) Grant access to the Respondent's facility by a health and safety inspector designated by the internal Union on dates sufficient to permit an inspection of the Respondent's facility for health and safety hazards to employees.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, layoffs, discharges, or other changes in the status of unit employees resulting from the Respondent's unlawful actions and any wage and benefit changes resulting therefrom; and within 3 days thereafter notify such employees in writing that this has been done and that the Respondent's unlawful actions will not be used against them in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Berlin, Connecticut, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director, after being signed by the Respondent's representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail at its own expense a copy of the notice to all current employees and former employees employed by the Respondent since February 1, 1995.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 34 a sworn affidavit of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally implement the terms and conditions of our last proposal for a collective-bargaining agreement or a new group incentive bonus plan without affording the Union an opportunity to bargain with respect to this conduct performed by unit employees and lay off unit employees as a result of such subcontracting without affording the Union on opportunity to bargain with respect to such conduct.

WE WILL NOT deny the Union access to our facility for a safety and health inspection.

WE WILL NOT in any like or related manner restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL rescind the terms and conditions of our last proposal for a collective-bargaining agreement and our new group incentive bonus plan and bargain with the Union upon request regarding these matters.

WE WILL restore the unlawfully subcontracted unit work to the bargaining unit employees and on demand offer to bargain with the Union over any subcontracting of unit work.

WE WILL allow the Union access to our facility for a safety and health inspection.

WE WILL, within 14 days from the date of this Order, offer employees who have been laid off, discharged, or otherwise suffered any change in position, duties, or status, full reinstatement to their former jobs and duties, or if those jobs or duties no longer exist, then to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make employees whole for any loss of earnings and other benefits resulting from the Respondent's unlawful actions, less interim earnings where applicable, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful layoffs or discharges, or discipline of employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful actions will not be used against them in any way.

EIS BRAKE PARTS, DIVISION OF STANDARD MOTOR PRODUCTS

William E. O'Connor, Esq., for the General Counsel.
Thomas M. Cloherty, Esq. (Murtha, Culling, Richter & Pinney), for the Respondent.
Sanford Kay, Esq., for Standard Motor Products.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of charges filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 376, (the Union), on June 13, 1995 (Case 34–CA–7107–1), June 28, 1995 (Case 34–CA–7130), August 25, 1995 (Case 34–CA–7201–1), September 15, 1995 (Case 34–CA–7229–2), September 19, 1995 (Case 34–CA–7237), and November 21, 1995 (Case 34–CA–7304), against EIS Brake Parts, Division of Standard Motor Products, (Respondent or the Company), an order consolidating cases, consolidated complaint and notice of hearing was issued on May 10, 1996, alleging that the Respondent has been failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). By answer timely filed the Respondent denied the material allegations in the consolidated complaint.

A hearing was held before me in Hartford, Connecticut, commencing on September 9 and ending September 27, 1996. Subsequent to the closing of the hearing the General Counsel and the Respondent filed briefs.

On the entire record, and the briefs of the parties, and upon my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a corporation, with an office and place of business in Berlin, Connecticut (facility), is engaged in the manufacture and sale of automotive brake parts, including wheel cylinders and master cylinders which it primarily sells in the "aftermarket" or "replacement" market to ware distributors, retail accounts, master installers, and program buying groups. Because of the unpredictability and volatile nature of its market, the Respondent has historically supplemented its own production with the purchase of some parts from other manufacturers to meet its production needs when there is an unexpected "surge in business all in one shot." In addition the Respondent has historically never itself manufactured a certain type of wheel cylinder product, known as "short line." The Respondent annually, in the conduct of its business operations, sold and shipped from its facility goods valued in excess of $50,000 directly to points outside the State of Connecticut. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The consolidated complaint alleges, and the Respondent admits that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 376 are labor organizations within the meaning of Section 2(5) of the Act and herein jointly called the Union.[1]

Since about 1962, the Union has been the designated exclusive collective-bargaining representative pursuant to Section 9(a) of the Act, as recognized by the Respondent in a unit of:

> All production and maintenance employees employed by Respondent at its Middletown and Berlin, Connecticut facilities, but excluding office and plant clerical employees, timekeepers, engineering employees, draftsmen, professional employees,guards, watchmen, foreman, assistant foremen, and supervisorsas defined in the Act.[2]

Since then the Union has been recognized as such by the Respondent, this recognition being embodied in successive collective-bargaining agreements, the most recent of which was effective from June 2, 1992, to June 1, 1995.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees by: since about July 12, 1995, refusing the Union requested access to its facility for a safety and health inspection; since about March 6, 1995, subcontracting work normally performed by unit employees, and has laid off employees as a result of that subcontracting; since about June 26, 1995, implemented the terms and conditions of its last proposal for a new collective-bargaining agreement; about July 13, 1995, granted a bonus meal to certain unit employees for achieving production goals; about July 21, 1995, changed its plant rules by providing drinks to employees in working areas; on about August 25, 1995, combined job classifications in the subassembly department; about October 9, 1995, combined job duties and created a CNC Cell in the wheel cylinder cepartment; and about October 30, 1995, implemented a new group incentive bonus plan, all without affording the Union an opportunity to bargain with respect to such conduct and without having reached a lawful impasse.

A. The Evidence

1. Background

Beginning in 1987 the Respondent and the Union engaged in a dispute over the Respondent's decision to relocate its rubber manufacturing operation from Middletown to its plant in Puerto Rico. After the Union filed unfair labor practice charges and complaint issued in Case 39–CA–3562 on May 12, 1988, the parties entered into a settlement agreement called the "Effects Package" whereby the Union agreed to withdraw the unfair labor practice charge, with the settlement agreement including a statement of intent by the Respondent concerning future transfers of unit work:

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[1] In the title of these proceedings this is unclear.

[2] It is undisputed that the Respondent closed its Middletown, Connecticut facility several years ago and no longer has any unit employees located there.

ATTACHMENT A

> The Company wishes to advise the Union that for the duration of the current Collective Bargaining Agreement, it does not intend to transfer any work currently and customarily performed at the Middletown and Berlin facilities other than the job previously announced to the Union. These are limited to the Rubber Departments and Distribution Departments, the Cable Assembly Department and Wheel Cylinder Kit Packaging.

In June 1988 the parties also entered into early contract negotiations well before the existing contract's expiration date. A "critical issue" for the Respondent was its desire to re-study jobs in the wheel cylinder and master cylinder departments. The parties negotiated changes in the contract, which included a clause entitled "Job Evaluations, Piecework and incentive rates," and a complex process entitled "Rerating of Incentive Jobs." Included in the details negotiated were the personal fatigue time allowances and agreement to establish a third shift.

Moreover, the Union was particularly concerned about job security in light of the transfer of work to Puerto Rico, and the parities negotiated a letter of agreement, which came to be known as the Connecticut Operations Agreement. The agreement called for the formation of a "competitiveness" committee, called the "joint committee," by January 1, 1989, to consist of two members of the Union and two from management, and would be called into action whenever the Respondent was confronted with a noncompetitive situation threatening its business. The first step to be followed when the Respondent faced such a situation was that the Respondent would notify the Union about it, discuss it then the joint committee would go out and evaluate the area where the Respondent indicated an interest in relocating or subcontracting. Part of the committee's responsibilities was to look at jobs on an ongoing basis to evaluate if the times allotted for those jobs, and the costs associated with them, could be reduced and the committee would then report its findings. The next step would come if the Respondent were to decide that it would relocate or subcontract the work because it was noncompetitive. If so, it was obligated to supply the Union with all the underlying information and/or cost analysis related to its decision, and the parties would meet to consider alternatives and to bargain over that decision. On completion of that bargaining, if the parties were unable to reach agreement, then the Respondent would proceed with its plans, and negotiate over the effects of its decision. It was never expressed during these negotiations that by entering into that agreement the Union was waiving its right to bargain to impasse before the implementation of any transfer or subcontracting of unit work.

In late 1991 the parties again met for early negotiations. The Respondent was faced at that time with an antiquated facility in Middletown which it was closing, while at the same time it wanted to consolidate the distribution and manufacture of its hydraulic operations in either Virginia or Connecticut. The Respondent proposed a two-tiered wage rate in distribution and for "red-circling" wage rates for employees from the Middletown plant, which was closed, who were transferred to the Berlin Plant to lower labor grades. The Union agreed to these proposals. The Union also cooperated with the Respondent in the 1991 negotiations in lowering medical costs by seeking, and ultimately getting, a better plan at less cost.

Finally, the parties slightly altered the language in the Connecticut Operations Agreement by extending it to 1995, and by calling for the formation of a joint committee "as soon as needed." That agreement, in its entirety, states:

LETTER OF AGREEMENT

November 5, 1991

Re: Connecticut Operations Agreement

> The Company has committed to the Union that it intends to maintain its facilities in the Middletown/Berlin area until June 1, 1995. During that period, the Company does not intend to transfer any work currently and customarily performed at its Connecticut facilities other than the jobs previously announced to the Union on May 12, 1988.
>
> It is understood, however, that if the Company is confronted with a situation that puts it in a non-competitive position that must be responded to in order to protect its business, it will discuss the situation with the Union. A joint Committee will be formed as soon as it is needed whose purpose will be to consider alternatives to make the Company's costs/jobs more competitive. The Committee will be called into action when the Company believes it has a situation requiring the Committee's attention. If the Company feels that it has no reasonable alternative other than to transfer or contract out a substantial part of its work, it will give the Union the data it relied on and the parties will meet promptly to negotiate the decision. If these negotiations have not been able to resolve the matter, then the Company will proceed with its plans as above. The Company will then negotiate with the Union over the effects.

The collective-bargaining agreement was made effective from June 2, 1992, through June 1, 1995.

2. Negotiations for a successor collective-bargaining agreement

As noted above, the parties had successfully entered into early negotiations for successor labor agreements in 1988 and 1991. In June 1994[3] the parties again entered into early negotiations for a successor collective-bargaining agreement with the current agreement to expire June 1, 1995.

The Respondent being faced with losses in its wheel cylinder products due to the lower prices of its competitors, Leonard Friedman the Respondent's director of human resources, called Russ See, the president of Local 376, and told him about the problems in the wheel cylinder product line, and requested a meeting to discuss its noncompetitive situation. The meeting took place on June 7, 1994. See attended with the Union Negotiating Committee, International Representative Richard Cardinal, and Local Financial Secretary/Business Agent Steve Edgerly. Attending for the Respondent were Friedman, Vice President/General Manager Dan Carboni, General Operations Manager Mike Paulus, Personnel Manager John Geoffrion, and Sanford Kay, Standard Motor's vice president for human resources. Carboni explained to the Union that there was a price war due to both offshore and domestic competition while Paulus explained the differences in cost per unit for wheel cylinders between the Respondent's and its competitors, and indicated that the Respondent needed to save about $1 million in labor costs per year based on project volume. Kay stated that it was not the employees' fault, but that the parent corporation,

[3] All dates hereinafter refer to 1994 unless otherwise noted, until p. 9 fn. 6.

Standard Motor Products, was concerned about the competition and the long-term future of the EIS parts division, and felt something had to be done to address the problems. According to Paulus there were two basic choices. (1) To achieve cost savings and continue to manufacture wheel cylinders; or (2) become a "reboxer," by subcontracting the production of wheel cylinders and simply reboxing them for sale. Friedman also explained his view of the Respondent's choices: (1) either ignore the problem, keep the prices as they are and hope to keep the business or (2) subcontract and rebox, or (3) move. See was unconvinced and responded that he had heard the "waltz" or "song" before. The Respondent then distributed various materials to the Union, including a "confidential" list of "savings potential" the list consisting of give-backs by the Union that added up to about $962,000 in projected savings. Friedman said that these were "avenues" that the Union could look at to make savings and were "only suggestions," and that the list was not "for publication:" See responded to the suggested concessions by saying there were other ways than this to deal with the problem, and reminded the Respondent of the cost savings assistance the Union had given in the past by procuring a cheaper medical plan, while avoiding increased costs for employees.

Russ See explained that it is standard UAW policy when an employer is seeking relief, that the employer must be prepared to exhibit its books to the Union to justify such relief and that the Union would send a letter requesting such information, and if the Respondent showed that it needed relief, the Union would "certainly want to Help." See also said that he was not prepared at that point to do anything and wanted to know what savings the Respondent was prepared to give on the management side. Friedman indicated that he hoped the information requests would not be "so huge" as to slow the process down unnecessarily.

On June 14, 1994, Russ See did send a letter requesting information and asking that the information be sent to the International, because it was standard union policy that an International auditor be assigned to such a situation, where an employer is seeking concessions, and a confidentialty agreement between the International and the employer is sought. On July 15, 1994, Friedman sent some information to the International's auditing department where the Respondent's case was assigned to International Auditor Bruce DeCastro. Friedman called him on July 29 and DeCastro informed him that he had received the materials the week of July 18, and had called the Local and expected to work with Steve Edgerly. He had also expected to be called by the Local before it closed for vacation, but that had not occurred. Meanwhile, the Respondent also shut down for vacation during the first two weeks of August but eventually, someone from the Local called and arranged for DeCastro to visit the facility on August 25, 1994.

On August 25, 1994, DeCastro met with the Respondent's divisional comptroller, Lawrence Mucherino, Paulus, and Friedman. DeCastro, while at first skeptical about the information which had been provided to him previously, became more confident that the voluminous information provided was accurate. He did not, however, elect to take notes of the substantial amount of information he received that day, and requested copies of backup records instead. The Respondent balked at the idea of providing copes of such records to DeCastro without having a formal signed confidentiality agreement, and DeCastro agreed to sign one. The Respondent drafted an agreement and faxed it to DeCastro on August 29, 1994, and since the UAW attorneys had to review it, there was a slight delay in reaching agreement. However, after some discussion between Friedman and DeCastro, Friedman faxed another proposed confidentially agreement on September 12, 1994, and it was signed on September 13. On completion of that agreement on September 16, Friedman sent by mail the requested backup information, which had been processed by Mucherino. On September 23 DeCastro spoke again with Friedman, and requested additional back-up information, which Friedman sent on September 30. In a cover letter on that date Friedman told DeCastro, "I hope to hear from you next week as we discussed so we can get on with the process which has already taken over three months just to reach this point."

However, previously on September 12 DeCastro had sent to Dick Cardinal, with a copy to Russ See, a memorandum outlining his findings to date, and advising them "to treat the problem seriously. If a deal could be reached that combined cost reductions with some sense of job security and continued production of all current product lines, we should probably consider it." He closed by informing them that he would update his report "as more information becomes available."

See appeared confused by DeCastro's analysis and so he called DeCastro and asked him to explain it "in layman's language" since he doubted that all the losses were in cylinders and his concern was whether the relief sought by the Respondent would "plug the hole or put a band-aid on it." DeCastro told See that he was "not through yet," and he was "having problems" with the Respondent, that there was some information that had not yet been given to him, and he was waiting for it. Cardinal also called DeCastro after receiving the September 12 memorandum and asked DeCastro if he was receiving further resistance to his information requests, and DeCastro said no, but that the Company had not yet responded and was in effect, "dragging their feet." DeCastro told him that the Company's economic problem was serious, from which Cardinal, given his long experience in dealing with DeCastro, inferred that the Union should "step up" and address the situation.

As a result of DeCastro's investigation, the Respondent came to learn that the situation in hydraulics was worse than it thought in June 1994. On October 6 DeCastro placed a call to Mucherino, who wasn't available, and spoke "off-the-record" to Paulus instead. He informed Paulus that if the financial information provided was "as stated," then the million dollars that the Respondent was seeking in relief would not be enough based on the current situation. Paulus responded that the million dollars had only been for the wheel cylinders, but that "similar pressures" were building in other areas, hoses and master cylinders. DeCastro asked Paulus if he had given up hope of concessions from the Union, and whether that was the reason for "cracking down" on the unit, referring to warnings and dismissals being given to unit employees. DeCastro said that management was not making it easy to ask the employees to help the Respondent and Paulus responded that he had not given up hope, and that management was "cracking down" only as a good business practice which should have been followed "all along."

On October 17 DeCastro called Paulus directly,[4] and suggested setting up a "team," whereby either See or Dick Cardi-

[4] Paulus stated that he viewed DeCastro as "trying to be a facilitator." He also testified that DeCastro had said that See "can be a little

nal, Paulus, and himself would discuss productivity issues, to further explain the extent of the Respondent's problems, and to discuss how to resolve these issues. DeCastro told Paulus that morale was low in the plant, and it was going to be very difficult to sell the "package" to the unit employees. DeCastro said that he had advised the Union that the Respondent was in trouble, and its problems would not go away and that "delay tactics aren't in the best interest" of the parties. DeCastro also indicated that he still had "some nagging doubts" about numbers that were unaudited and prepared strictly for the Union and said he was to speak with Mucherino the next day. DeCastro also explained to Dick Cardinal that he was uncomfortable with the Respondent's accounting system, and the Respondent's accountant had not been able to answer his questions, and needed to get back to him.

Paulus reported to Friedman about his conversation with DeCastro and DeCastro's request to set up a meeting between Paulus and either See or Cardinal. However, Friedman testified that he, "just never [got] back to him" about that request and Friedman never explained why he failed to respond to DeCastro's request. While professing to being "never really quite sure of DeCastro's role," Friedman never expressed any interest in tapping DeCastro's expertise nor exploring what DeCastro might be able to achieve.[5]

DeCastro did call Mucherino and requested some additional backup information which Mucherino faxed him on November 3, 1994. After receiving this information DeCastro drafted another memorandum that day which he sent to Cardinal and See, and which reaffirmed his recommendation to treat the problem seriously. See was at the International Union's election in Dearborn, Michigan, at that time, and received the letter on his return on November 7.

While Friedman knew that Russ See was in Michigan at that time, he mistakenly thought See would be meeting with DeCastro. Friedman called See on November 7 and was advised by a secretary that See was at a meeting and "might be back by end of the day," but "would be unavailable" on November 8, and had a meeting on November 9. She did not know See's schedule after that and See did not return Friedman's call that week. Friedman sent a letter on Friday, November 11, to See in which, after recounting his version as to what had transpired since June 1994 stated:

> It is our understanding that your auditor has shared with you his findings and recommendations but to date you have not responded to our repeated requests to negotiate.
>
> As a result of your lack of response we must conclude that we are at an impasse and we have therefore begun to take and have taken appropriate steps in order to protect our business.
>
> Initially, we have increased our purchases of low cost product from outside suppliers which will have the effect of not restarting the Third shift in January. We are continuing to evaluate our sales forecast and results to determine if further layoffs will become necessary.
>
> At this point we honestly feel we have no reasonable alternative. More than five (5) months have passed and we're still not negotiating and our losses are mounting each day.

It appears that Friedman makes no direct request for negotiations in that letter but instead, declared impasse, announces the Company's intent to subcontract and threatens layoffs. Nor does the letter indicate when or how the Respondent had made "repeated requests to negotiate." There is no evidence in the record that the Respondent made any requests to the Union to "negotiate" since the June 7, 1994 meeting. While Friedman had expressed to DeCastro in his September 30 letter that he hoped to hear from him the following week so they could get on with the process begun in June, it was DeCastro who requested to Paulus that a meeting be set up, but Friedman "never got back to him on that."

On November 14 Russ See called Friedman and told him that he had not returned his November 7 call because he thought Friedman was calling about a grievance, and he wanted Edgerly to handle it. Each accused the other of "dragging" their feet "and Friedman said the Company felt "the ball was in his court to come to the table." Friedman asked if he had met with DeCastro and See said he had not, but that he had received a report from him and Friedman suggested that See meet with Dan Carboni, but See refused. Instead, See said he thought Carboni and Paulus were the problem. Friedman denied that, and said the market place was the problem. Friedman asked if the Union was ready to meet, and See said that Friedman should send a letter whereupon Friedman said he already sent a letter requesting negotiations. See said Friedman would hear from him.

Unbeknownst to see Friedman had held a meeting earlier that day with the Local's negotiating committee to bring it up to date on what had transpired and the fact that "I had called him [See] on the 7th and a week had passed and he had not even returned an urgent phone call." After See discovered this meeting had taken place, he called Friedman on November 15 and asked him if he held a meeting with the negotiating committee in the plant the day before. Friedman said it was "to bring the negotiating committee up-to-date, that we had been losing money," and that he had tried to reach See on November 7 but that See wasn't returning his phone call. Friedman explained to See that the situation was very urgent, and they were not trying to go around See or negotiate with the committee; but were trying to get the committee, to understand the situation the Company was in and "maybe they could light a fire under him to come to the table because he wasn't ever returning my phone calls." Friedman asked See if he was ready to come to the bargaining table, and See said he would hear from him in the mail.

See sent a letter that day to Friedman in which he took exception to the statements in Friedman's November 11 letter declaring impasse, and threatening to eliminate the third shift, and also stated:

> If the company is that anxious to sit down with Local 376 representatives to discuss relief, all it takes is a letter requesting a meeting to address this issue instead of meeting with the in-plant committee trying to undermine the leadership of local 376.I look forward to any written request made by the company.

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difficult to deal with . . . and had advised the Union that we were in trouble and that it was not advisable to go into any further stall tactics."

[5] DeCastro had great experience and expertise in helping troubled companies. His method was to deal directly with manufacturing management personnel, without the presence of labor relations personnel, in developing and "breaking through alternative approaches to these kinds of situations." Indeed, as noted above, Friedman admitted that it was DeCastro's investigation that led the Respondent to grasp the gravity of its own situation.

In a subsequent phone conversation, Friedman informed See that he had not heard from him, and see said he had sent him the letter which Friedman denied getting, so See faxed him another copy on December 5. In the meantime, Friedman had apparently sent a letter to See dated December 2 in which he similarly claimed not to have heard from See for 2 weeks and informing him that the Company had announced "additional layoffs in the wheel cylinder department and in two other departments that service those jobs." He recounted how the Company's losses were now beyond the wheel cylinder product line, and stated, "We will be reviewing other options to stay our losses. The problems we are having are not going away and must be addressed." Friedman did not request negotiations in that letter, and instead simply threatened to take action (i.e., layoffs). On December 5 Friedman sent another letter to See thanking him for faxing the November 15 letter, and claiming again not to have received it before. In that letter he noted: "Since Dan Carboni and Mike Paulus are away on a sourcing trip to China this week, I would prefer we meet as soon after Tuesday, December 13 as possible to address our mutual problems."

The parties met on January 11, 1995,[6] and Friedman began by recapitulating what had taken place to date and said that the Company's losses continued to mount.[7] He said that the Company needed relief as soon as possible, and that they were afraid that the Company would have to "write off 1995 as another big losing year." See asked what the Respondent was suggesting and Friedman said that they wanted to open up the contract early, but "because of the Company's non-competitive position, have a deadline of February 28, instead of June 1," the contract expiration date. If there was no resolution at that point, then the Company would subcontract wheel cylinders. However, See did not approve of the idea of an early deadline "right from the beginning" and according to Friedman, See said "I don't believe you can legally put demands on the table that I cannot meet, and if I cannot meet them, you can subcontract." Friedman responded that "[w]e have rights under the existing contract to do subcontracting." Friedman told to the Union that the Company wanted a deadline of February 28 so that the subcontracted orders could be received by June. However, Friedman stated at the hearing that the Respondent chose that deadline because the contract was to expire on June 1, and the Company wanted to have an outside source in case the Union struck. This reason had not been given to the Union previously.

See explained that he would have to go to the membership to get approval and asked what exactly it was that the Company was proposing, stating, "Let me make sure I understand this. You want me to tell the membership we open up the contract early, with a February 28 deadline, and if we don't have it solved by February 28, you're going to subcontract?" Friedman concurred that was the Company's position and that the Respondent was concerned "about the Union's belief in the numbers" because See had indicated that his accountant wasn't sure about them. Friedman felt the Union wasn't accurately presenting the Company's position to the membership, so See invited Friedman and Paulus to speak directly to the membership at a shop meeting the following day to explain the situation. Friedman and Paulus did speak directly to the membership on January 12. The Local had never asked Company officials to speak to the membership before.

Despite their presentation, the membership rejected the Company's proposal to open the contract with a deadline of February 28, but voted instead to open it up with no deadline other than June 1, 1995. See telephoned Friedman and told him of the membership's decision and that the membership had voted to present two options to the Company. In a letter dated January 17 to See, Friedman described the two options presented to him, and explained why the Respondent was rejecting one of the options:

> Thank you for verbally presenting the two negotiations options to me on Friday, January 13. As I understand the offers, one was to open early contract negotiations without a deadline other than June 1, 1995 (instead of our February 28 proposed date) and the other was to just deal with our current non-competitive position by discussing economic relief options now and then negotiate the contract when the time comes.
>
> I'm sure a lot to time and effort was spent on coming up with these two proposals but we remain concerned about bringing the negotiations to a conclusion in time to help 1995. We feel that the second option, trying to deal just with the economic relief, will be almost impossible because we will have to deal with the Collective Bargaining Agreement anyway.
>
> This leaves the first option, the early opening as the more sensible approach provided we both have a mind to really deal with the issues and bring in a Contract and relief long before the present one expires. To have any real impact, February 28 still seems to be a sensible target.
>
> Therefore, we would choose the early opening option with the understanding that if there is no significant progress towards our economic problems on a prompt and timely basis, we retain the options provided in the Connecticut Operations Letter of Agreement dated November 5, 1991. We must keep this option open to protect our business which translates into jobs for all of us.

In contrast to what he stated in his letter, in his testimony Friedman claimed that he informed See that, in the event that negotiations did not reach a resolution by February 28, the Company would, pursuant to the Connecticut Operations Letter, again provide the information to the Union already given and then subcontract. His letter, however, was far more ambiguous. While acknowledging that the Union had rejected the February 28 deadline, he now described it as a "sensible target," and stated that if there is no progress" on a prompt and timely basis" then the Company retained its right under the Connecticut Operations Agreement. The letter does not spell out what he meant by retaining such rights.

Moreover, in a letter to Friedman dated January 19, See makes no mention of Friedman's claimed Statement that the Company would subcontract if no progress was made by February 28. The absence of any reference in See's letter to the purported Statement would be inexplicable if Friedman had in fact said it, since on its face See's letter meant "to set the record straight":

[6] All dates hereinafter refer to 1995 unless otherwise so stated.

[7] Friedman testified that he also told the Union that the losses amounted to $5.2 million per year, and that the Company wanted $1.7 million in concessions from the Union. However, both his own bargaining notes and those of John Geoffrian, chief note taker for the Respondent, show that this subject was first broached at the February 1 meeting, when the Respondent presented its list of "Cost Savings Operations" to the Union.

> I am in receipt of your fax and letter dated January 17, 1995. To set the record straight, it was the Company who proposed to the Union to consider opening the contract and negotiating early. With that proposal you named a deadline of February 28, 1995. The membership voted, unanimously, to open the contract for early negotiations, without any deadline other than June 1, 1995. The membership also voted, that if the Company's position was that the February 28, 1995 deadline stayed, we would not open for early negotiations. The membership also gave the option to the Union committee, to enter into bargaining of the Company's proposal for cost reduction, which must be brought to the membership for ratification. These negotiations will be based on the option provided in the Connecticut Operations Letter of Agreement dated November 15, 1991.
>
> As per our telephone conversation, I am glad that the Company is in agreement with the membership to open negotiations early with a deadline of June 1, 1995.

It appears that in his letter, See makes clear that the options presented to the Respondent were either early contract negotiations with a deadline of June 1, or immediate negotiations for economic relief pursuant to the Connecticut Operations Agreement. He thanked Friedman for choosing the first. In his testimony, Friedman claimed that when he received See's letter he was "so happy . . . to get to the table that this [i.e., See's letter] didn't contradict anything . . . that we had discussed," and the Union understood that the Company was reserving rights under the Connecticut Operations Agreement. When confronted with the fact that in his own words he had switched from describing February 28 as a "deadline" to "a sensible target," he claimed that in his mind "sensible target" was "as close to a deadline as you can have" and while "deadline' is a stronger word . . . it means virtually the same thing "as" sensible target."[8]

The parties began negotiations on February 1 for a new collective-bargaining agreement, the day after the Union had already scheduled elections for the new negotiating committee. Previously, on January 31, 1995, Lawrence Sills, president of Standard Motors Products, addressed all the employees wherein he expressed his disappointment with the Union for its lack of cooperation on a cost reduction plan. At the February 1 meeting, the Union questioned why this had occurred, and Friedman admitted that Sills had, in fact, expressed "disappointment" in the Union's lack of cooperation about the cost reduction plan. At this meeting the Respondent presented a list of "Cost Savings Options" and Friedman explained that the Company had lost $5.2 million, and asked the Union to pay for one-third of it, or $1.7 million each year of the labor agreement. Friedman said the Company would look for other avenues to pick up the remaining losses. Asked if the list was a "demand," Friedman said no, they were only options to find $1.7 million and the list was not meant to be "all-inclusive." The parties reviewed the list, and Friedman explained that $1.7 million was the target, and the Company hoped the Union would have its own ideas and suggestions. See said he thought that $1.7 million was "unrealistic," and said the Union's accountant had trouble with the way the Respondent did its books. See also expressed puzzlement by the fact that the Respondent was now making requests in areas other than wheel cylinders. Friedman explained that the wheel cylinder department was no longer the only problem, but now the whole hydraulics operation was in trouble. See asked why the Company was including distribution, and Friedman explained that if the Company was not packing and shipping product, there would be no need for distribution and the number ($1.7 million) was too big to simply put on the wheel cylinder people. Paulus presented a chart at that meeting comparing the benefit and fringe package at the Respondent's Berlin plant with those of competitors.

Many of the options listed had costs attached to them. The Respondent's method of estimating such costs was to take a unit size of 276, among whom 203 had family medical benefits, and 73 had single coverage. It also utilized an average salary of $13.12 per hour. Utilizing these figures it then projected savings for many of the items listed. However, at trial the Respondent described some of those figures as "hard," meaning they led to immediately and calculable savings, while other were "soft," and the projected savings were a matter of conjecture. Other items were noneconomic and had no costs attached to them at all. One such item directly infringed on the Union's ability to represent employees, item no. 26, which said union stewards could not be part of any "teams," citing "efficiency problems in cells."

The parties met again on February 2. See reiterated that he could not believe the Company was asking for so much money in concessions from the unit employees and said he thought it was unrealistic. Friedman informed the Union that the Respondent was having a time study done by the H.P. Maynard Company, which was a proponent of the MOST system, and that productivity was going to be a very important part of the Company's proposal. Friedman said Maynard was the "Cadillac" of predetermined time systems, and was highly regarded in the field. He gave the Union a business card for Roger Weiss,[9] President of Maynard, and said Weiss had done work for the UAW. The Union canceled the next scheduled meeting to work on its own proposals.

The parties next met on February 16 and 17. At the February 17 meeting Friedman began by discussing the continued losses that the Company was experiencing and said the month was coming to a close and the Company had still not received any proposals from the Union. Friedman stated that if no relief was forthcoming by the end of February, the Company would subcontract. See said he would have proposals at the next meeting, but that Friedman should not have any expectations that they would be anywhere near $1.7 million. Friedman stated that he thought "this thing" was "dragging on," and wasn't "resolving anything quickly "and See got upset and said, "Then why don't you just go ahead and subcontract everything out?" See said that his accountant was still uncomfortable with the numbers, and referred to the Company trying to put the whole $5.2 million loss on the Union and accused the Company of trying to take advantage of the situation. Friedman said that the Respondent was only asking for $1.7 million, and argued that the Company should not be blamed for any confusion regarding the Union's accountant and that losses were mounting and the

[8] It appears that in effect Friedman claims that the Respondent had gotten what the Union specifically rejected, i.e., opening the contact negotiation early, and if no contract was reached by February 28, the Company could subcontract unit work. Moreover, See had expressed that the Respondent could not lawfully threaten to subcontract if the Union did not agree to its contract proposals.

[9] The transcript mistakenly identifies Weiss as "Lise" at p. 635.

Company still needed relief. The parties then reviewed the proposals.

Meanwhile, unknown to the Union, the Company had drastically increased the subcontracting of wheel cylinders, and significantly increased subcontracting of master cylinders, in February. February was in fact the highest month of subcontracting in those areas. Thus, as the parties negotiated for a new collective-bargaining agreement, the Respondent had already implemented and made good on its threat to subcontract unit work. The Union, however, was not notified of the implementation until March, when it received a letter from Friedman to that effect. The Union, unaware of these facts, had DeCastro fly in from Detroit to once again attempt to find an alternative way to help the Company without having the unit employees take such drastic cuts in their wages and benefits.

The March 2 meeting began with DeCastro, in accordance with his standard practice, meeting with the Union's bargaining committee to explain to them that the Company had a problem. He related his great experience in helping companies with competitiveness problems and explained to them that he would like to pursue some ideas with certain members of management privately, and spent 3 to 4 hours in the process of convincing the committee to be flexible, and to agree to such a private meeting between DeCastro and someone in management to which the committee finally agreed. The Union than proposed such a meeting between DeCastro and Paulus, or possibly Carboni with the Respondent's comptroller, Mucherino, present and Russ See, but not the Human Relations Personnel Sandy Kay or Friedman. The Union expressed that the meeting might "break the log jam and resolve" their problems. Paulus at first expressed his willingness to go to such a meeting, but the Respondent's negotiating committee refused. When the parties did finally meet that day for negotiations. See asked whether the Respondent's list was a "proposal´or did they have a proposal? Friedman responded that he felt that See was trying to set a "legal trap" for him, and the Respondent caucused. When they returned, Friedman said, "These are our proposals."

The parties met again the next day, March 3. The Respondent gave the Union a document entitled "Clarification of Proposals Discussed March 2, 1995." That document made no mention that the listed items were to be considered only as "options." The parties also discussed, and the Union rejected, a proposal concerning the equalization of overtime. See also hand delivered to the Respondent an information request dated March 3. The parties now had a heated argument, and See expressed that there were things in the Union's proposals that the Respondent never would have gotten in normal negotiations, things that did not have a price tag on them. Friedman's response was "that's what negotiations are all about, for us to ask you things." See stated, "All right. Then we have a proposal for you, to change some language," and then handed the first Union proposal to Friedman. See told the Company to disregard the economic proposals which he would address lather stating, "These are not our economic proposals," and to consider the noneconomic ones. The Company caucused and Friedman, who was "very upset," started yelling telling the Union that its proposals were not responsive to the $1.7 million request and told See that the Respondent was "very disappointed about it." The parties again referred to subcontracting, and See said he did not like the "threats" that the Respondent had made in previous meetings to subcontract if it did not get relief by the end of the month (i.e., February). See again said that $1.7 million was "unrealistic" and DeCastro also added at that meeting that he felt that it was unrealistic to ask the bargaining unit for that much money.

On March 6 Friedman sent See a letter informing him that the Respondent was subcontracting unit work, and would lay off 51 employees, and listed the number of employees to be laid off in each department. The letter did not, however, specify what, or how much, unit work was to be purchased from outside, but did state that "These orders, once placed, are not cancelable." The layoffs were to begin March 31 and to be completed by about May 12.[10] Moreover, Friedman in the letter states:

> In your letter of January 19, 1995, the Union agreed to open negotiations but rejected the February 28, 1995 deadline. You did acknowledge in that letter that "these negotiations will be based on the options provided in the Connecticut Operations Letter of Agreement Dated November 5, 1991."

However, See had in fact given the Respondent two options. First was early contract negotiations with no deadline until June 1. The second option was to negotiate for cost reductions, which "negotiations will be based on the option provided in the Connecticut Operations Letter Agreement dated November 15, 1991." The negotiations for a new collective-bargaining agreement were not based on the Connecticut Operations Agreement. Additionally Friedman claimed in the March 6 letter that a joint committee had been formed pursuant to the Connecticut Operations Agreement. However, not only had the joint committee not been formed as contemplated by that Agreement, Friedman had himself expressed at the January 11 meeting that "[w]e did not actually follow the Letter of Agreement," and instead went to "paragraph 3," thus bypassing paragraph 2, which called for the formation of a joint committee.

See responded by letter on March 7 taking exception to the February 28 deadline and stating: "We had resolved this issue in writing that there was no deadline except the current contract deadline of June 1, 1995." He rejected Friedman's claim that the Connecticut Operations Agreement had been followed, and demanded that the Respondent "cease and desist" from subcontracting unit work "and abide by the November 5, 1991 Letter of Agreement." He also requested that the Company demonstrate at the next meeting where the Company planned to make savings of $3.3 million of its own as promised, beyond the $1.7 million demanded of the Union.

At the next meeting, March 9, the Respondent came in with further "clarifications" of its proposal, as "options." Friedman made clear at the start of the meeting that they were not proposals. Friedman reviewed the past since June 1993, and stated that they had six bargaining sessions and the Respondent felt they were no closer to resolving the Company's economic problems, and that See had in fact said he would address economic issues lather. He explained that they felt they had "no choice on March 6th, we just couldn't wait." Friedman said the orders had to be placed by February 28 to be received by June 1, that there was a 12-week turnaround period, and the orders could not be canceled. See testified that the Union felt they

[10] The letter appears disingenuous in that, it attributes the Respondent's decision to subcontract to the events which transpired during negotiations, particularly when the Union presented its own proposal on March 3. However, as noted above, the Respondent had already began the process of greatly increasing the subcontracting of wheel cylinders and master cylinders in February.

were holding a gun to our head over this issue. The Union requested additional information, and Friedman responded that if they kept asking for more information, "We're never going to get anything resolved." See asked how the Company had come up with the 51 layoffs expressed in the March 5 letter, what was the cost factor, and would that cost be deducted from the $1.7 million the Company was seeking in concessions. Friedman responded no, the layoffs would be temporary, and if the Union gave them $1.7 million, the employees would come back. The Company did not, however, ever give the Union the cost factor concerning the layoffs.

The Respondent did give the Union a list of purported management savings. Included In that list was the layoff of 12 office positions in 1994, which had a cost factor of $451,000, and an additional reduction of five office positions worth $210,000. Again See asked, in light of the Company's use of these layoffs to offset their cost savings, could the Union use the layoff of the 51 unit employees to offset the $1.7 million expected of the Union. Again, Friedman said no.

At this meeting the Union once again tried to set up an offsite meeting between DeCastro, Carboni, and Mucherino, but the Company refused if Friedman was not present. At the end of the meeting, See suggested that DeCastro meet with Mucherino. When DeCastro and Mucherino did meet, DeCastro again tried to convince the Company to set up a meeting between Russ See and Mike Paulus, which DeCastro and Mucherino could attend. DeCastro expressed to Mucherino that he had "some amount of doubt about the financial situation," and indicated that it was so big he thought the Company may be "trying to basically finance a move through asking the Union for concessions." DeCastro indicated that he felt that Paulus and See were the principals involved, and that Paulus had been put there to turn the Berlin plant around, and that's why they wanted to talk to Paulus.

The parties met again on March 10. Once again See attempted several times to set up a meeting with DeCastro, Mucherino, Paulus and See. DeCastro got upset because he could not understand why they wouldn't meet and listen to him, and since he felt there was no commitment on the part of the Company, he left the meeting. The parties caucused and the Union waited around, with the expectation that the Company would be getting back to the Union, but not having heard from them, the Union decided to adjourn for lunch. Lather Friedman and Kay came into the dining hall very upset and Friedman told See, "We're in our caucus room waiting for you, and you're having lunch." See answered, "Well, that wasn't my understanding. You were supposed to get back to us," to which Kay responded they were "breaking off negotiations." See said, "Whoa, wait a minute. I have a proposal to give right after lunch." Kay said, "Mail it," to which See responded, "I ain't mailing it, I don't mail things. I'm going back to the table and we're going to bargain it." Kay said, "No, for today. Put your proposal in the mail," and the Respondent's representatives walked out.

The next meeting was scheduled for March 15. When the parties met Edgerly informed the Company that See was in the hospital. The Respondents representatives said they were expecting a proposal that day, and refused to meet without See. Cardinal said that he was authorized to bargain for the Union, and was prepared to meet but the Respondent refused.

Cardinal wrote a letter that day protesting the Respondent's refusal to meet without See's presence, and accused the Respondent of engaging in "corporate extortion." Friedman responded by letter dated March 20, in which he blamed DeCastro for delaying negotiations stating, "What followed over the next five months (from June to November) [1994] was an endless stream of questions, many of which concerned items of insignificant value and/or utter irrelevance." Friedman went into great detail in attacking the Union's attempt to set up a private meeting. Moreover, he claimed that although DeCastro attended the March meetings, he asked no questions about the Company's "accounting methods or numbers." However, at the hearing, Friedman admitted that DeCastro had in fact challenged those numbers at the bargaining table.

Friedman would repeat his accusations about DeCastro in another letter dated May 10, in which he stated:

> Despite our cooperation, it took from June of last year to November (during which time we had to respond to an endless barrage of requests for information for your auditor to agree that we had, in fact, lost approximately $5.2MM in this facility over the past twelve months

However, at the hearing, Friedman admitted that DeCastro had only made three information requests, and it was his questions which alerted the Respondent to focus on the gravity of its situation.

Moreover, the March 10 and 15 meetings appeared filled with rancor and recriminations. As See recounted at the hearing, the announced subcontracting and layoffs had an "enormous impact." It was perceived as a "threat," an act of "intimidation to us that we've got to play by their rules, or they're going to take their marbles and go home. It's their way or the highway." The membership was "scared" into thinking that the Company wanted them to strike, "to take us on, and probably close the plant." It "upset the total membership, especially when the layoffs were posted." Moreover "the parties were at each other's throats from then on."

The parties next met on March 21. Prior to that meeting, Friedman responded to the Union's March 3 information request by letter dated March 17. The letter explained that by the end of April, in-house production of wheel cylinders would be down to 3600 per day, while the products purchased on the outside would be 5500 per day. The "short line," also called the Economy Line, were those wheel cylinders never manufactured in Berlin, would remain at 2000 per day.[11] The Company also provided two lists, one identifying part numbers subcontracted since January 1994, and one identifying those parts changed in 1995 to being purchased on the outside because "our costs were too high." The lather list was titled "Purchased Wheel Cylinders from March 3, 1995." However, as noted above, the Respondent had in fact greatly increased subcontracting of wheel cylinders, as well as master cylinders, in February, and the documents do not explain in any way how to distinguish which parts were subcontracted in February 1995. Friedman's letter also informed the Union that H.P. Maynard was continuing a study at that time.

At the March 21 meeting See began by questioning why the Respondent refused to meet on March 15, to which the Respondent answered that they had not gotten any proposals in the mail, and that was the reason for not meeting. See asked if the Company had asked the Union's bargaining committee if they

[11] Reading par. 1 of that letter makes clear that the "Short line" and "Economy Line" are the same thing.

had the proposals, and reminded the Company that it was a three-party agreement (i.e., the local and the International are joint representatives) and the Respondent had an obligation to sit down with the committee and the International. The Respondent then presented information to the Union, and Friedman offered to have Carboni meet with See about further discussion of management cost savings figures and some bargaining. See agreed to meet with Carboni the following week.

The parties next met on March 29, with See and Carboni first meeting privately in an off-the-record meeting, in which See gave a proposal to Carboni. Lather, when negotiations were to begin, the Respondent objected to the presence of a state mediator requested by the Union. Kay got angry and said he didn't know the mediator was coming, and refused to meet with him. See told him the meeting was over if they did not let the mediator in. The mediator explained the Connecticut statute to Kay who then consulted with his attorneys, and the Respondent representatives finally agreed to meet, but expressed their displeasure with not being notified earlier about the mediator.

The Union then gave its first economic proposal, in effect accepting the Company's proposal to eliminate wash-up (worthy $144,844 according to its own proposal) if the Company guaranteed full employment for the unit (i.e., 273 employees). The Respondent got upset because the proposal did not reach the amount requested. The rest of the meeting continued with a discussion of the Respondent's subcontracting of returned goods to its Manila, Arkansas plant. When See tried to learn the costs of that move, he was told to ask DeCastro. He said, "I'm not asking DeCastro, I'm asking you if this is going to be part of the $1.7 million." However, the Respondent did not want to speak about that cost. See asked, "What good is it to negotiate $1.7 million if you're going to lay off people?" Friedman responded that their "long-term plan is not to contract these jobs out." At that meeting, the Respondent provided See with responses to what he had discussed with Carboni, but See became upset because that meeting had been confidential, and he had expected a call from Carboni.

The parties next met on April 5 without See, whose father had died, and the parties reviewed the Union's noneconomic proposals. The parties met again on April 12 also without See wherein the Union conveyed two new proposals that day regarding the loss of one holiday if an employee failed to work the preceding or following workday; and a proposal about the disciplinary system. The parties also reviewed a union effects proposal which had been faxed to Friedman the prior day. Friedman agreed to put the Respondents responses in writing.

The parties did not meet again in negotiations until May 4. Prior to that date Friedman sent two letters dated May 1 to See. One of the letters presented revised company proposals, including a notice of a new productivity proposal and a new bonus incentive plan to be presented by Roger Weiss from the H.P. Maynard Company at the May 22 meeting. Friedman said in that letter that they would try to brief the Union's time study expert Dan Trull on May 3 when he would be at the plant since he knew that Trull could not attend the May 22 meeting. While the letter also states that the "Company's proposal to reduce labor costs by $1.7 million dollars annually remains on the table," Friedman goes on to say that the Company had "revised our proposal to reflect what must be included if we are to reach agreement on or before June 1, 1995." However, the various economic items in the new proposal added up to about $2.1 million in concessions, and the letter does not indicate how different the wage proposal to be given on May 22 would be from what had previously been proposed.

In Friedman's other letter dated May 1, he responded to the Union's economic proposal which See had said to ignore by effectively rejecting all of them. He also rejected a number of noneconomic proposals, stated which proposals had been tentatively agreed to, and otherwise responded to a number of specific proposals. Moreover, he claimed that he was sending the letter "in the interest of moving along negotiations and avoiding impasse." Friedman never explained why he thought sending advance notice of the wholesale rejection of the Union's proposal would help avoid impasse, particularly when See had already, as noted above, informed the Respondent that he did not negotiate by mail.

On May 3 Trull visited the facility to investigate a dispute over some production standards. There was a grievance pertaining to CNC turntables. Steve Edgerly had contacted the time study engineering department to have an evaluation done and Trull had been assigned to it. Edgerly, who picked Trull up that morning, mentioned to him that the Company wanted to speak to him about the MOST system. Friedman had called Edgerly prior to that day and informed Edgerly about the Company's intention to discuss the MOST system that day. Trull, however, was not expecting to discuss the MOST system prior to that meeting.

After discussing the production dispute with the Respondent's industrial engineer, Ken Caya, Trull was brought to a meeting with Friedman, Paulus, Geoffrion, and Caya. Edgerly and Local President Lockhart were also present. Friedman presented Trull with the copy of a chapter from a MOST textbook and said the Company wanted to change incentive systems, and wanted to restudy all production standards in the plant utilizing the MOST system. There then was a general discussion about utilizing MOST and converting to a new incentive system and Trull indicated that he did not feel there was a serious problem with the Respondent's existing production standards, and questioned whether it would be worth the expense of restudying all the jobs using MOST. He agreed that a new incentive system could be designed without changing the existing production standards. Friedman, however, stated the Company's desire to redo all standards, and said that they did not feel comfortable with the existing standards. Trull expressed that any incentive system implemented should be a "one-for-one" system in which every one percent increase in productivity resulted in an increase of one percent in employees' pay. Friedman said the Company wanted to change the Personal Fatigue and Delay Time Allowance (PF&D), but Trull said he was not prepared to meet for any length of time because he had a plane to catch, and he would not be able to get into any in-depth discussion on the MOST system. They did not get into details of any particular system at this meeting, which was short.

Negotiations continued on May 4. See expressed his displeasure and said that the Union did not negotiate by mail, referring to the proposals sent to him by Friedman on May 1. He said that the Union had not had a chance to consider all of its proposals at the table. Friedman said the Company was trying to speed things up and claimed that the Union had refused to negotiate about various items. After discussing the transfer of returned goods on reduced costs, the parties then reviewed the Union's proposals.

The parties met on May 5. They first discussed costs again, and then continued reviewing the Union's proposals. At some point in the afternoon, Friedman said that they did not want to discuss the Union's proposals anymore, and wanted to begin discussing the Respondent's proposals again. The Respondent refused to continue discussing the Union's proposals and See got upset and said they should bring in the mediator. The Respondent first suggested a caucus, and then suggested ending the meeting at that point, since it was due to end soon anyway because Paulus had to catch a plane. As the meeting broke up See informed the Company that the Union was not prepared to meet with the Maynard representative on May 22 because Trull could not attend. Friedman got "totally upset," and said the Company would break off negotiations until the Union met with Maynard and stormed out of the room.

By letter of May 10 Friedman recounted the events of May 5, claiming it was the Union who was refusing to meet, as well as alleging that DeCastro had subjected the Company to "an endless barrage of requests for information" between June and November 1994 as described above. Moreover, he stated that the Company regarded the "negotiations as temporarily 'on hold' until you 'get ready' for them to continue." However, at the hearing, Friedman admitted that it was the Respondent who was refusing to meet unless the Union agreed to meet with Maynard's president, Weiss, on May 22. Additionally, Friedman claimed that the Union had agreed to Weiss' May 22 presentation, and that "we had already briefed your incentive expert, Dan Trull, earlier in the week." However, it appears that all Trull was given was a chapter from a textbook, and informed that the Company wanted to have a new incentive system utilizing MOST, without giving any details.

Further, Friedman also claims in the May 10 letter, "This plan, as you are aware, is critical to our proposals and joint survival." Despite the assertion that See was "aware" of how "critical" this plan was, as far as appears from the record, this was the first time Friedman ever described the "plan" as "critical" to its survival. The Respondent's insistence on having Weiss' presentation occur on May 22 is made completely inexplicable by the fact that both Weiss and Trull were available on other dates, and the Company knew that. Moreover, Friedman acknowledged that the Union would need its expert in order to bargain over the plan and there seems to be no justification for the Respondent's insistence on discussing MOST with the Union without Trull's presence, particularly where Friedman described the new incentive system to be "one of the most significant linchpins in the whole process."

See wrote back immediately on May 11, saying that the Union was going to show up on May 22, but that the Union was not prepared to meet with Weiss regarding the incentive system because Trull was unavailable. Friedman responded by letter dated May 17 in which he again recounted his version as to what had transpired on May 5 and said Weiss would make his presentation on May 22, regardless and suggested that the Respondent could bring Weiss back on another date after May 22.

The parties did meet on May 22 during which they discussed the Union's grievance proposals, reached agreement on some other items, and the Respondent agreed to type those agreements. They also exchanged some counter proposals.

Weiss spoke to the committee at 2 p.m. making a presentation using charts, and explained the new incentive system, and said that union employees could earn up to 120 peercent under the new system. He explained that all jobs would be retimed. He got into a lot of technical detail about the system which See admittedly did not understand. Weiss also presented to the Union a document which actually consisted of two separate documents. The first was entitled "*SUPPLEMENTAL AGREEMENT GOVERNING CONVERSION FROM THE OLD INCENTIVE SYSTEM TO THE NEW EIS BRAKE PARTS STANDARD HOUR PLAN"* (the Supplemental Agreement). It set forth the new rates for employees on incentive in each labor grade, which reflected a 10-percent decrease in their base salary once the jobs had been retimed, and when the new "EIS BRAKE PARTS STANDARD PLAN" (which was the second document, and herein called the Standard Hour Plan, and cited as 'SHP'). was implemented, and new standards were "installed for group/'focus factory'."

The new Standard Hour Plan called for, inter alia, that the new incentive standards "will be established to provide an earnings opportunity of approximately (20%) above the incentive base rate." It also gave discretion to the Company to establish allowances: "Reasonable allowances for personal, cost and unavoidable delay will be applied to the standards." Normally, PF&D allowances are negotiated with the Union and in fact, the parties had negotiated those allowances in 1988. Moreover, in its previous proposals, the Respondent had prepared changing the existing PF&D from 15 to 12 percent. The Standard Hour Plan stated that "incentive earnings will be calculated for each employee for the total hours worked on incentive during each work week." Attached to the Standard Hour Plan was an "Example" of how the bonus would be calculated, but it left open a number of questions. It did not, for example, identify which group of employees, direct and/or indirect, would be included. The Standard Hour Plan also did not explain how the bonuses would be calculated. It appeared from the Example that actual down time was being used for that calculation. The existing System also had used actual down time. Moreover, the Standard Hour Plan itself stated:

> Delays may occur which are beyond the control of the employees because of equipment failure, power failure, lack of material, quality problems, lack of schedule, or other causes. Such delays will be properly accounted for by appropriate time reporting.

Thus, it appeared from what was presented to the Union that actual down time was being used in the calculation. Neither the Standard Hour Plan nor the Example explained what PF&D allowances were being utilized in the calculation. The Respondent explained that the new system would be implemented gradually throughout the plant.

In the proposal presented to the Union that day the Respondent replaced its original proposal of an across-the-board 50-cents per hour wage cut, which it had estimated to be worth $308,000, with a 10-percent cut for employees on incentive, the value of which it calculated at approximately $506,812. In total, including the elimination of red circles worth $189,00 and "hidden red circles" worth $45,000 the Respondent proposed $741,404 in concession wage cuts that day. For included employees, whose average wage was $13.12, it requested an average cut of 81 cents more per hour than the previous proposal. The new proposal also replaced the Respondent's previous proposal to drop the PF&D allowance from 15 to 12 percent, which the Company had estimated to be worth $110,502. The new proposal did not include an estimate as to what savings the Company would achieve with regard to PF&D allowances.

After the meeting the Union faxed a copy of the Supplemental Agreement and the Standard Hour Plan to Trull, who received it in early June. Trull had a number of concerns, including, inter alia, how senior employees would be affected; how the standards would actually be developed, how allowances would be factored into the standards; what these allowances would be; the fact that the proposal would lock the Union into one specific type of individual technique; how down time would be compensated; how the bonus calculations would be done, and which employees would be involved. Trull sent a letter on June 6 to See listing some of his concerns and See used that letter to draft his own letter to Friedman that same day requesting answers to Trull's questions.

Meanwhile, negotiations continued with the parties meeting on May 28. The Respondent and the Union went through various proposals, and the parties modified two previous proposals.[12] They then discussed the incentive MOST system proposal, and See complained that the Union did not have any input into drafting the language. Friedman explained that the Company had drafted the language with Maynard and that most of it was "boilerplate." Friedman stated that standards would be set so there would be a bonus potential of 20 percent. See said he would have preferred to be present at the drafting of it, and there were still some questions that he had and he wanted his expert to look at it. The parties also reached tentative agreement on certain language issues. The parties next met on May 30 and cleared up some of the language items. The Respondent submitted some new and revised proposals which the parties reviewed. See stated that it was unrealistic to expect the Union to come up with $1.7 million, and asked for the Respondent to lower its request. He also wanted to know, before the Union would make "strong proposals," about what was being done on the management side to hold down losses. The Company also formalized its new productivity proposals in writing and included the elimination of its red-circles in its productivity proposals.

The parties met again on May 31 and working through the mediator each party went through the other's proposals. The Union rejected most of the Respondent's proposals, while stating that it would consider some and the Respondent went through and rejected each of the Union's economic proposals. The Respondent made some new proposals on that day and the parties also signed off on a number of proposals. About 3:15 p.m., the Respondent gave the Union a letter from Carboni to its employees. See suggested very strongly that the Company should not do this since, he felt it was direct dealing but in fact, the letter had already been given to the membership by then. The letter related the critical nature of the problems the Respondent faced regarding competition and financial losses and the need to lower costs, and set forth its proposals to the Union.

The parties met on June 1, and for the first time significant progress was made. The Union made two different offers. In its first proposal, which was given verbally, the Union offered to eliminate red-circles in 3 years, at the end of the contract, so the employees could be retrained for other jobs. As noted above, the Respondent estimated that the elimination of red-circles was worth $189,290, and the elimination of "hidden red circles" was worth $45,000. The Union offered to have the employees share medical costs by paying $45 per month for family coverage, and $15 per month for single coverage. Utilizing the Respondent's method of calculating, which was to take the figure of 203 employees with family coverage, and 73 employees with single, and multiply by 12 months times the amount of each contribution ($45 or $15) for the potential annual savings, the first Union proposal was worth $122,760.[13]

The Union also proposed to accept the Respondent's proposal on holidays, in that those maintenance employees who worked would be paid straight time during the Christmas shutdown. The Company had valued this proposal at $6298. The Union accepted the Respondent's proposal to eliminate wash-up time, which was valued at $144,844. The Union proposed a 5-percent decease in wages for employees on incentive, which was worth $253,406. (The Company had projected a 10-percent cut to be worth $506,812.) However, the Union rejected the MOST time system. The Union also proposed that the existing no-fault language be eliminated, and a new disciplinary policy be negotiated. It also proposed that the Union be allowed to review the Company's books each year, and if the Company showed a profit, there would be a possible wage increase, which would be negotiated right then. No one would get a wage increase, which meant the elimination of the annual COLA which the Respondent had valued at $28,704. The Union also agreed to give "serious consideration" to "Attachment B" which would establish a tow-tiered wage system, and which was valued at $125,257.

The Respondent offered its counterproposal, and for the first time lowered its demands of $1.7 million in concessions. Included in the Respondent's counterproposals was a reduction in the monthly contribution for medical insurance from $90 to $65 per month for family coverage, and from $30 to $15 per month for single coverage. Utilizing the Company's method of calculation, that meant it dropped its medical proposal by $25 x 12 months x 203 (family), and $15 x 12 x 73 (single) for a total of $78,420. The Company reduced its flex force proposal from 30 to 25 employees. The Respondent had valued its original proposal at $187,200. Reducing that to 25 employees would mean the Company dropped its proposal to $156,000 or a drop of $31,200. The Company dropped its incentive wage rate to 8 percent, or a drop of about $101,762. The Company also proposed to extend its restriction of vacation to 4 weeks to office personnel. The Company offered to keep red-circles for 6 months. It also dropped its proposed reduction of sick days from 4–3 days. Its original proposal to eliminate 4 sick days had been valued at $115,876, so the new proposal called for $28,969 less in concessions. The Company also offered to allow the Union to review its books each year, and offered to negotiate a future wage increase with a cap.[14] The Company altered its proposal on bidding for jobs. The Company identified the proposals which it was offering and apparently dropped all other proposals not previously agreed on. The Respondent made a new proposal with regard to the incentive system, submitting three different systems, one being MOST. Each party could remove one, and the remaining one would be the System to be used. The Union insisted on its proposals on the incentive system, but added that it wanted to negotiate the whole Sys-

[12] The Union proposed modifying the holidays to include Monday before July 4 in 1995; the Friday after July 4 in 1996; and Easter Sunday in 1997. This was the only other union proposal relative to economics proposed by the Union since March 29.

[13] That figure is roughly reflected in the Respondent's notes.

[14] Presumably this meant if the Company showed a profit, but the record does not make this clear.

tem, no longer specifically rejecting the use of MOST. The Union also offered to give up one sick day, which was valued at $28,969.

The Union offered another counterproposal. There was no change in the Union's position on removing red-circles and the Union still accepted the Respondent's proposal on working during Christmas shutdown at straight time. The Union did reduce its proposal on medical insurance from $45 to $40 per month contribution for family coverage, and from $15 to $10 for single coverage. See explained that he did this because the Union had made other concessions which were worth more. The incentive proposal was now worth $16,380 less than its previous proposal, and amounted to $106,380.

However, the Union accepted the Respondent's attachment B (new pay scale tier II for hires, bumpers, and job bidders hired June 2, 1995, or later) which was worth $125,207, with an exception regarding a clause 11(a), that had no cost value. The Union also offered to eliminate the 5th week of vacation for employees. Employees who would have been eligible for a 5th week would receive a $300 bonus in the first year of the contract, $250 in the second, and $200 in the third. The number of employees affected by this proposal was in the high 90s, and Kay estimated the average value of this proposal at $27,000.

The Union proposed a wage freeze, including bonuses, for management as well as the unit employees. If violated, employees would get a 3-percent increase. Similarly, if the Respondent made money in any of the 3 years, the employees would get a 3-percent increase. As no mention was made of the washup proposal after the Union's second proposal was given, it was not clear whether it was still included or not.

The Respondent now offered its final proposal which called for approximately $1.35 to $1.4 million in concessions. Among the new features of its final proposal, the Company offered to keep employees red-circled for 1 year and dropped its flex-force proposal down to 20 employees. The Company also offered to negotiate an increase in any year that it showed a profit, not to exceed the percentage of profitability.

Towards the end of the meeting, a union representative called Detroit, but Trull was not there, and Edgerly spoke instead to George Codeluppi. Codeluppi said the Union should counter with a "one-for-one" incentive system. See informed the Company that the Union was willing to try the MOST system if it was "pure," and if it was a:"one-on-one" system. He was not, himself, however, able to explain what was meant by those terms. When See asked if the MOST system was "one-for-one," Friedman said he did not know. The Union told the Company that it would bring the Respondent's last proposal to the membership for a vote, but would not recommend that it be accepted. By letter dated that day, See notified the Respondent that the union membership had rejected the Respondent's last offer. See advised the Respondent that the employees would return to work immediately and work under the existing agreement, and the Union would continue to bargain in good faith to reach an agreement. He suggested that "since tempers are high, we request that we take a 2-week cooling off period and set a date after that to continue bargaining."

By letter dated the next day, June 2, a Friday, Friedman told the Union:

> We are disappointed that the Union rejected our final offer. We remain firm in our position and assume that since you do not wish to continue meeting that the Union is also retaining its position. If this is not the case, we request that we resume negotiations on Monday, June 5, 1995 and are prepared to meet on consecutive days.
>
> As you are well aware, the Company continues to lose money and further delay in resolving the situation could jeopardize our future.

In his letter Friedman also accuses See of possibly promoting illegal behavior, accused him of "stalling," and demanded negotiations resume immediately.[15]

As noted above, See sent a letter on June 6 to Friedman requesting information, as to the answers to Dan Trull's questions. He also specifically stated in that letter that he was in receipt of Friedman's letter, expressed regret that the Respondent's position was "being firm," and stated that the Union was willing to meet but first needed the information requested. He also said that the tone of Friedman's accusatory letter showed that Friedman did "need a cooling off period," and suggested that all arrangements for future meetings be made through the mediator. He also advised that "this type of threatening and intimidating letter only antagonizes the situation."

Friedman, however, sent a letter on June 7 accusing See of being unconcerned about the Company and its employees and declared impasse.

> Your failure to respond to me to meet this week and your request to pull three (3) members of the Negotiating Committee out of the plant next week makes it clear that we indeed have your final offer as you indicated on June 1.

On June 13 Friedman sent another letter in response to See's information request, and claimed that he had not received the information request until June 8. Curiously, unlike the prior letters sent on June 2 and 7, which he faxed, this letter was only sent by mail, and received in the union office on June 20. Moreover, Friedman made new accusations, and specifically claimed the Union was being regressive because it already had the information and had already agreed to its proposal. He further went on to accuse See again of potentially illegal behavior, and said he now had two unidentified "sources" for his accusations. Finally, he once again appears to declare impasse.

> Our position on the items in our final offer remains firm. Since you elected not to meet thus far, we assume you remain opposed to our final offer.

The letter did not respond to the Union's offer to arrange meetings through the mediator.

Friedman sent another letter the next day, declaring impasse, and announcing the Company's intention to implement its proposals.

> Enclosed is our final offer of June 1, 1995, which you have already rejected. As we indicated to you in our June 2, 1995 letter which you confirmed in your June 6, 1995 letter, our position remains firm.
>
> As you know we have been meeting since June of 1994 and have not come close to reaching an agreement. Therefore, under the circumstances, we see no prospects to

[15] Friedman's demands to meet on the following Monday, and for consecutive days thereafter, seems disingenuous on Friedman's part since he knew before the June 1 meeting that See would be leaving to attend a union national convention soon thereafter. See had in fact been planning to go for months in advance, and had requested that the shop chairman, vice chairman, and shop steward be granted leave to go with him.

an agreement and wish to give you notice of our intention to implement elements of our final proposal on June 26, 1995.

It is notable that not only did Friedman in his letter make no mention of arranging another meeting, but instead declared that the Respondent now sees no prospect for an agreement. The Respondent did not renew its demands for urgent and immediate meetings and the only intervening event was See's information request, in which he indicated a desire to set up meetings.

Attached to his June 14 letter was a typed version of the Company's last proposal in which Friedman makes an important alteration He described "as agreed on" both the MOST system and the "Group Incentive System." This is particularly disingenuous in that See had specifically stated in his June 6 letter that "various items in the proposal are unacceptable in this current form." Thus, Friedman could assume that when he sent his new version of the Company's last proposal that See would immediately object to it. Moreover, Friedman admitted that on June 1 the group incentive plan had not been "finalized."

See responded to the June 12 and June 14 letters denying Friedman's claims, and protesting the announced intention to implement the last proposal on June 26. Additionally he recounted the Union's efforts to set up a meeting, and how the Company now refused to meet at a hotel, as it had in prior negotiating meetings, thus causing new problems and delay for negotiations. Friedman responded by letter dated June 22, in which he admitted refusing to meet anymore in hotels, citing cost reasons. He also informed the Union that the mediator had set up a meeting for June 26, the day of the Respondent's announced implementation of its final proposal.

On Friday, June 23, Friedman sent See a notice that the Respondent would no longer honor the dues-checkoff provision in the expired agreement. Neither Friedman nor Kay were able to offer any explanation as to what purpose they had for such an act on the eve of resumed negotiations, beyond the simple claim of a legal right to do it. Indeed, when the administrative law judge asked Friedman directly what the purpose of this action was, Friedman became confused and had to be instructed by the judge to stop looking to his counsel for help to answer. The evidence shows that the Respondent was clearly preparing for implementation of its final proposal. To that extent personnel drafted notices to employees dated Saturday, June 24, informing them that they would need to make medical copayments corresponding to the Respondent's last proposal.

The parties met briefly on June 26 during which the Union delivered a written proposal to the Respondent. In its proposal the Union moved in several areas. It increased its proposed reduction in pay for incentive workers from 5 to 6 percent, which would be worth according to the Company's own figures, an additional $50,681. It included as a condition: "If it is the Company's position that we can earn 20% on a new incentive System that % is reachable by the employees." The Union also added a "drastic" change in its vacation proposal, reducing the bonus for those employees losing their 5th week of vacation down to $200 each year, down from $300–$250 in the first 2 years of the contract. The Union also offered to accept the Company's Cost Reduction Plan, which had been valued at $50,000. Finally, the Union, for the first time, stated that it would "accept a group incentive plan, but we must sit down and work out a fair and equitable system for the employees." This was particularly significant in that the Union had not previously stated its willingness to accept a "group incentive plan," and since the Union has historically been opposed to the concept. The Union also expressed its willingness to negotiate a new rate setting system, "be it 'MOST' or any other."

Friedman reviewed the proposal and said there was "some improvement, but not far enough," and it was not what they expected from the Union. He said the Union needs to go further than this whereupon the Company then caucused. When they returned Sunday, Kay had replaced Friedman as chief negotiator with no explanation given for the sudden removal of Friedman. Kay said the proposals were "not meaningful. As a matter of fact, they're regressive and they are rejected." He ended the meeting, and said, "That's all for today." Kay said their final offer was on the table, and See said that the Union would "take that offer into consideration" and "re-evaluate our position, and set up another meeting."

Both Kay and Friedman testified that the Union's offer that day was regressive. Their explanations, however, are confusing. Both Kay and Friedman claimed the Union's proposal was regressive because the Union requested that "all" subcontracted work be brought back to the plant. Friedman admitted, however, that the Company's position had been that if the Union can come up with $1.7 million in savings, the Company would bring the work back. Kay claimed that the word "all" was ambiguous, and could apply to work which had always been subcontracted. They did, however, ask for an explanation from the Union.

Kay also claimed that the proposal was regressive because it conditioned the wage cut in incentive pay on the ability of employees to make a 20-percent increase, that the 20-percent goal be "reachable" for each employee. Somehow, Kay found that to be regressive, despite the fact that it was the Company's own proposal, the Standard Hourly Plan, that described how the new incentive standard "will be established to provide an earnings opportunity of approximately twenty-percent (20%) above the incentive rate." Similarly, the Respondent's own productivity proposal dated May 30 describes that it will establish "an incentive system that will generate earnings that can average 20 percent of the new straight time hourly rate. Kay also claimed he wasn't sure if the Union's proposal meant 20 percent for individuals or for the group. The Respondent did not, however, question the Union to explain what it meant.

Moreover, Friedman found "regressive" and Kay found "ambiguous" the Union's wage freeze proposal. Kay claimed it was capable of being interpreted one of two ways, in that it includes management "bonuses," and he did not know if that meant that only any increase in such bonuses be frozen, or that any bonuses at all be frozen. He did not, however, ask any questions or ask for an explanation about this. Kay also had questions, which he did not ask, about the Union's proposal for a 3-percent increase if the Company was profitable. Kay appeared to claim that the Union was also being regressive by offering the $50,000 Cost Reduction Plan, a former company proposal, because the Union had previously rejected it.

Moreover, on June 26 the Respondent implemented its contract proposals as it had announced its intention to do so by letter on June 14. On June 26, the day of continued negotiations, the Respondent also issued to employees a memorandum, from Carboni announcing that "we are implementing all of our last proposals," and that certain of those would have "immediate effect." Medical contributions, overtime to be paid only after 40 hours of work, uniform contributions, the reduction of

sick days, and the elimination of holiday pay for employees on worker's compensation leave. The Respondent's personnel department had also prepared on Saturday, June 24, the new contribution for employees' medical insurance.

Included in the notice was a copy of the version of the Company's final proposal already given to the Union on June 14, which claimed the Union had agreed to MOST and the "group incentive system." Interestingly, on that same day, Friedman sent a letter to the Union to which was attached a different version of the Company's final offer, and the difference is of particular significance. The letter itself contained various allegations of regressive bargaining, including the claim that the Union had agreed to MOST and the group incentive system on June 1. It is important to note, however, "that the version of the Company's final proposal attached to the letter does not describe either MOST or the group incentive system as proposed." What makes this significant is that Friedman obviously had this document typed *after* he had been notified that the Union had rejected this proposal, because it specifically stated that at the top of the document. The inference is unmistakable that sometime between the rejection of its proposal by the Union on June 1 and 14, the date on which the Respondent, by letter, announced its intent to implement, which included the different version of the Company's final proposal, the Respondent came up with the claim that the Union had agreed to the group incentive system. There is no evidence in the record to support that claim. Indeed, on June 1, See told the Respondent that the Union could accept the MOST system if it was "one-for-one," but Friedman was unable to explain if the system was one-for-one. It is undisputed that the system implemented was not a one-for-one system. Therefore, it is arguably untrue what Carboni had informed the employees that the Union had done.

Friedman's letter is also of particular importance in that he clearly expresses the fact that the Respondent had already declared impasse on June 14, and that its actions since the June 1 meeting were explicable only from the perspective of that declaration of impasse.

> We wrote you on June 14, 1995 that we were going to implement our last offer. We met today, and remain at impasse and, in fact, we are now further apart than we were on June 1, 1995. Thus, we are going to implement the June 1, 1995 proposal which is attached, effective immediately.

On June 27, Russ See wrote back to Friedman, contesting statements made by Friedman in his June 26 letter, and demanding that the Respondent cease its implementation of its last proposal. Only two negotiating sessions for a new collective-bargaining agreement took place after June 26. The Union requested an additional meeting to negotiate over the Company's new Group Bonus Plan, which incorporated the MOST system, but the Respondent refused to negotiate.

On July 13 the Union presented a new proposal with some changes which the Respondent rejected. When See asked if the Company still was seeking $1.7 million in concessions, Kay refused to answer, and told See to "add them up" himself. Kay claimed that it was a "trick question" by See, and Kay felt that he "was being maneuvered into a position where the Union wanted me to say yes, we are still demanding $1.7 million." He based this fear on the fact that he did not have the Company's last offer in front of him and, "I probably hadn't reviewed the offer in a while."[16] Further, when See asked questions regarding prior claims by the Respondent to have cut office positions as part of its own cost reductions plans, Kay simply told him It was none of his business. Moreover, the Respondent said it would no longer pay for the union committee persons during organizing.

Towards the end of August Caya approached Union Chairperson Lockhart and suggested that he allow shop floor employees to participate in the installation of the MOST system. Lockhart refused because the Union had not approved nor recognized it and the Union had consistently refused to participate in the "technical teams" implementing the new system. The Respondent went ahead and established standards, developed a bonus calculation, and ran a 4-week pilot program which did not affect employees' actual pay at the time. In September Lockhart informed See that he had been approached by Geoffrion about the implementation of the new incentive system, and told that Geoffrion would be holding meetings with employees about it. Lockhart told Geoffrion that it was a mandatory subject of bargaining, and should be negotiated. When See learned of this he sent a letter to Friedman recounting what Lockhart had told him, and requesting bargaining "over your proposed incentive System."

Friedman responded by sending See a copy of the Group Bonus Plan which was to be given to employees in the packaging area. Friedman claimed:

> The purpose of the meetings is to give this first group of affected employees an overview of what we have already presented to the negotiating committee in our final offer.
>
> Enclosed is a copy of the handout we will give the employees. This material and the calculation follow as the same procedure we presented to you and the committee in our final offer.

By letter dated October 2 See advised Friedman's that his claim that the new Group Bonus Plan had been previously presented to the negotiating committee was "totally incorrect," and demanded bargaining over the group bonus plan. Friedman responded by letter on October 6 and specifically claimed that the Plan had been previously presented:

> The bonus calculation technique was included as part of the proposals made to you and as part of our final offer. The brochure you received with the September 26, 1995 letter just restates the technique as it applies to the Packaging department. The brochures were distributed last week as we indicated.
>
> My files indicate that since June 1, 1995, when the contract expired, you have not met with us or made a proposal on this subject. We told you on June 26 that we

[16] The General Counsel asserts that the fact that the Respondent's new chief negotiator had not even bothered to review the Company's last offer before meeting with the Union at the first meeting since the Respondent had implemented that very offer could be interpreted, along with its prior conduct, as indicating a lack of intent on the part of the Respondent to bargain in good faith for a new collective-bargaining agreement. Moreover, Kay's total indifference to accurately communicating the Company's position, particularly since See's simple question was so intrinsically relevant to these particular negotiations, where the amount of, and nature of concessions were at the heart of the negotiations, would tend to substantiate this.

> were implementing our final offer of June 1, 1995 and this was part of that proposal.

However, when See sent a copy of the material to Dan Trull, Trull saw immediately that there were significant items in the new plan not given before in the package the Respondent gave to the Union on May 22. In particular Trull questioned how the "Group Bonus Percentage" was to be calculated. The new group percentage included an item 5, a 3.5-percent adjustment for nonproduction and off-standard work. Trull had no idea how this number had been arrived at and had not seen such a number in other facilities. He saw item 4, referring to something called "fixed order value," and he had no idea what that was. He questioned what would happen if actual nonproductive time exceeded 3.5 percent, would employees begin to lose incentive earnings. He also saw that this new system, contrary to the "general rule" was only going to credit "pieces received as good." He questioned what the document meant by "determining how many production hours the group worked," and assumed that referred to "direct hours," but wondered if it included the off-standard adjustment. Trull had other questions about how the Group Bonus Plan calculation was to be done.

Prior to a meeting set up for October 19, Lockhart showed Trull some summary sheets from the Packaging Area, entitled "EIS Brake Parts Operation Combined Report," which Trull reviewed. He learned that the Respondent was implementing a 12.6-percent PF&D, or manual, allowance in that area, and that it was going to use an add-on method in applying the PF&D allowance to the standard. Previously, most of the plant had utilized a reduction method. Trull testified, and Respondent offered no evidence to the contrary, that the use of an add-on method increased the required output of employees for achieving a bonus as compared to a reduction method. None of the items listed above had been specified in the May 22 proposal given to the Union and, even Friedman admitted that the system had not been finalized as of June 1.

Meanwhile, See sent a letter on October 18 in which he, inter alia, asked if the Respondent was still subcontracting wheel cylinders at 5500/day (excluding the 2000/day for the short line) and was the Company still looking for $1.7 million in concessions.

When the parties met on October 19, the Respondent simply refused to negotiate over the Group Bonus Plan, which included MOST. Friedman testified:

> Well, they had Mr. Trull present at the meeting, and Mr. See began asking whether we felt he had the right to negotiate MOST and the incentive System, and we said, basically, that he had his chance to do that prior to this meting on the 19th, that we had invited the shop committee in to the meetings that we had in October and that we felt that we would listen to his ideas and suggestions and his thoughts and we would try to make the System work and if he had thoughts or ideas we would certainly take them into consideration.

The Respondent refused to negotiate on several grounds. As notched by Friedman, they claimed the system had already been agreed to. They also claimed that the Respondent did not have to bargain because the parties were at impasse, and had simply implemented its last proposal. Finally, Kay also claimed the Respondent had a right to implement without having to bargain in the first place, based purportedly on the expired contract. Additionally, when See had mentioned that he believed the Union's proposal was worth $1.2 million, Kay demanded that See show the Respondent how. See said that he would show him at the next meeting, but the Union was here to negotiate about the MOST system, and told them to put their request in writing, and Friedman did. The meeting, in Friedman's own words, "got ugly" and ended shortly, with the Respondent requiring the Union committee to go right back to work or they would not get paid.

By letter dated November 3 Friedman informed See that the amount of subcontracting was down to 4300/day. Friedman once again declined to answer the Union's question as to whether the Respondent was still seeking $1.7 million in concessions.

The next and last negotiating session took place on August 29, 1996. See gave the Respondent a new proposal, based on the numbers the Respondent had been using throughout negotiations, and which added up to $1,142,444. See spoke about how the parties should resolve their differences, and get together and work on the training program. He said that while the proposal did not itself include the MOST system, the Union was willing to work with the MOST system with the International's approval of the numbers. The Company caucused. When they returned, Kay said if that proposal had been given in June 1995, "it could have probably been accepted. But because of the condition of what's going on in the Company at this time, it's rejected." Kay explained to the Union that the figures in the original proposals, which the Union was using in its new proposals, were no longer any good because of the changes which had taken place in the Company, meaning the number of employees then employed. By the summer of 1996 the average "head count" of unit employees was down to about 225.

Meanwhile, the Respondent had continued implementation of the Group Bonus Plan, which included the MOST system. Moreover, there were variations in the new system in different areas. When the Group Bonus Plan was implemented in February 1996 in the Hose Assembly Area, it appeared to be the same as in the Packaging Area. However when the Respondent implemented the Group Bonus Plan in the wheel cylinder department, a different off standard allowance, 5 percent, was used. Further, the Union learned that the Respondent was using the add-on method of applying the PF&D allowance in the wheel cylinder and hose assembly areas, where a reduction method had been used previously. Also, the Union learned that the Respondent was using a 15.6-percent PF&D allowance for certain areas.

3. Unilateral changes in terms and conditions

a. Subcontracting and layoffs

As notched above the Respondent greatly increased the subcontracting of both wheel cylinders and master cylinders beginning about February 1995. Further, it appears that the original amount of such increased subcontracting of wheel cylinders had gradually gone down from 5500/day to about 4300/day by November 3, 1995. By March 20, 1996, the Respondent had "reduced its outsourcing of wheel cylinders by about 50 percent." These records appear to contradict the conclusionary assertions at the hearing by Friedman that he "believe[s] it is now back in house." However, when confronted with his own Statements to the Union that the Respondent had decreased to 4400/day, he changed his testimony to make it even more conclusionary. "I believe that the work that resulted in the layoffs has been brought back in house." However, when asked how

many wheel cylinders were currently being subcontracted, he could not answer the question.

Both Friedman and Geoffrion gave similar testimony as to how many employees were actually laid off as a result of the increased subcontracting, limiting it to 13. Moreover, both claimed that all 13 were recalled by the end of 1995 or early 1996. However, this testimony was unsupported by any records introduced by the Respondent at the hearing. The record show as however, a far greater impact on the unit, which has declined to about 225 employees, just about the number of lost positions, 51, that the Union was originally informed about in Friedman's March 6, 1995 letter. Friedman's letter said layoffs would commence on March 31 and be done by about May 12, 1995, and would be spread throughout the plant.

On March 31, 1995, Geoffrion notified Unit Chairperson Lockhart that 12 employees would be laid off effective April 15, 1995. Because employees had certain bumping rights under the old contract, about 23 employees were actually affected. On June 7 Lockhart was again notified of further layoffs. A review of Lockhart's records show as that about 10 employees took actual layoffs at the time, while many were affected by the bumping procedures. Further, it also show as many employees were bumped into temporary jobs. On August 21, 1995, an even greater number of layoffs occurred with about 42 employees actually being laid off, and 79 affected. However, the bumping rights of unit employees were different at that time because the Respondent had implemented its last contract proposal, which thus affected who got bumped.

See wrote a letter on August 23, 1995, requesting information about the increased subcontracting, requesting effects bargaining over the new layoffs, and demanding that the Respondent cease and desist from implementation its new layoff procedure.

Friedman responded by letter dated August 25:

> 1. By the time this layoff is completed, approximately fifty people will be placed on layoff. These layoffs are *not* the results of our decision to subcontract additional work outside the plant. They are a result of declining sales and a need to reduce our inventories. When the inventories are back to a more manageable level, we anticipate recalling these people back to work. The information we previously gave you on subcontracting has not really changed.
>
> 2. Regarding the new layoff procedures, that was part of our last proposal and nothing had changed since then.
>
> 3. Since these layoffs are not intended to be permanent we believe the contract's layoff/recall provisions as amended in our last proposal should cover this situation.

See responded by letter dated October 6 reiterating his previous requests, and stating that the inventories were higher based on the subcontracting.[17]

[17] The Respondent's claim that increased inventory and not subcontracting is the cause of layoffs, begs the question. It is undisputed that the Respondent began greatly increasing subcontracting in February 1995, well before the layoffs. Friedman admitted that the Company wanted the outsourced parts partly as insurance in case the Union struck the plant on June 1. Therefore, inventory was obviously increased by the subcontracting which took place prior to the layoffs and the undisputed fact is that the Respondent continued to lay off employees during the period it was continuing to subcontract wheel cylinders and master cylinders previously manufactured in the facility.

b. Unilateral implementation of the Respondent's final offer

As notched above, the Respondent implemented its last proposal effective on June 26, 1995. Further, it has continued such action by implementing the new layoff/bumping procedures as decribed above, and completed the implementation of the Group Bonus Plan throughout the plant. Employees have been disciplined under the MOST system as well.

c. Additional unilateral changes

On July 13, 1995, the Respondent's plant superintendent Scott McGregor approached Lockhart and informed him that the employees in the hose assembly area had achieved 100-percent productivity, and that the Company was going to provide pizza to them as a reward. Lockhart said they should not do so because there was no contract, and he would file a grievance. McGregor said they would do it anyway and proceeded to do so.

About July 21 Mike Paulus approached Lockhart and informed him that employees were requesting cold drinks on hot days, and therefore the Company had planned to provide Gatorade to the employees. Lockhart objected to this because the Company had a policy restricting food and drinks on the plant floor. Lockhart said that he would file a grievance over the Respondent doing things like this without negotiations with the Union. Paulus said he was sorry Lockhart felt that way, it was a safety issue, and the Company would go ahead and provide it, which it did. Paulus admitted that no negotiations took place because, in his eyes, safety issues are not negotiable.

d. The combination of jobs in the subassembly and wheel cylinder department and the creation of a CNC Cell in the wheel cylinder department

On or about August 25, 1995, Focus Factory Manager Steve Levack spoke to Lockhart and informed him that the Company would be combining jobs in the subassembly line. Lockhart said the Company couldn't do that, and should negotiate with the Union about combining any jobs. Geoffrion informed him that there were about seven employees affected, and only three or four would be needed in the area once the combination was accomplished. Geoffrion said that they were going to follow the same procedure as in the past. The Respondent went ahead with the combination, and it led to the layoff and reassignments of certain individuals. At the hearing Geoffrion explained that in the past when the Respondent combined jobs, he would notify Lockhart, and after implementing it, the Union would grieve if there was a problem. When the Union filed a grievance, the Respondent asserted that it was following "both the contract and past practice in job combination." There was, however, no contract, and no arbitration procedure in effect.

About October 9, 1995, McGregor informed Lockhart of another job combination in the wheel cylinder department. Lockhart told McGregor that they could not do that without negotiating with the Union. McGregor said they were going to combine them anyway. Lockhart then spoke to Geoffrion, and advised him that the combination should be negotiated since it would result in layoffs and Geoffrion said it was experimental. The Company went ahead and combined the jobs, and the Union grieved this action. However, the Company discontinued the combination because it felt it had not worked out and the Respondent does not appear to deny that it altered the job duties of the affected employees for several weeks, and did so without negotiating.

The management clause of the expired collective-bargaining agreement gives management the exclusive right "to introduce new or improved production methods." Article 12.E sets out the procedure to be followed when a new job is established. The Company gives the Union a copy of the job description and the Union has 30 days to grieve the job classification and its slotting in the established labor grade scale. Geoffrion believed he had given Lockhart notice of the changes.

Generally, according to the Respondent's witnesses, when job combinations were contemplated, the usual procedure was for the Company to "run" the new job to see what was involved and then resolve issues under the grievance procedure. Geoffrion testified that UAW Time Study Engineer Danny Trull preferred this process because he could not review a job in the absence of the grievance and he liked to see the job actually in operation so he could review it. Lockhart confirmed that there had been a practice to see how new jobs operated and then discuss the matter after the fact.

The Respondent maintains that this process was followed in the subassembly department and in the CNC combination. The Respondent gave notice of the intent to combine certain job classifications in subassembly. Lockhart met with Geoffrion and Geoffrion informed him that the Company would use the same procedure as it had in the past. The Union then filed a grievance proceeding without negotiating the impact on employees. The Respondent's response was that it was following the contract and past practice.

According to the Respondent there was no impact on employees due to the job combination. Lockhart initially believed that two employees were impacted but then after review of his layoff records he conceded on cross-examination that they were not. The Union did not pursue its grievance.

The same process was followed in the CNC Cell. The Union was given notice of a prospective change. Lockhart and Geoffrion met and Lockhart testified that Geoffrion informed him that this job combination was only on an "experimental basis." The Union filed its grievance and the Respondent indicated that this was a "potential" change and it did "not yet know what would happen or if it will actually work." There was about a ten day trial period, after which the Respondent decided not to proceed with the job combination. The Union subsequently requested that its grievance be placed "on hold." The Respondent agreed but took the position that if there was no further action in 30 days the Company would consider the matter settled or withdrawn.

e. The Respondent's refusal to allow a safety inspection

On June 30, 1995, Steve Edgerly sent a letter to Friedman requesting dates "as soon as possible" for an inspection by a Health and Safety representative of the International Union "due to several complaints." Lockhart had related a number of safety concerns to Edgerly, besides one regarding a pending grievance about noxious fumes caused by an outside contractor using epoxy paint, including slippery floors due to oil, loose extension cords on the floor and ceiling, and unsafe machines. Friedman called Edgerly about July 6 and asked him what specific complaints there were. Edgerly mentioned the grievance about fumes caused by painting with epoxy, and also mentioned that there were slippery floors due to oil on the floor. Edgerly did not hear from Friedman, so he sent another letter dated July 13, 1995, requesting dates. Meanwhile, Friedman had placed in the mail a letter dated July 12, 1995, in which he stated he "wasn't sure why you are requesting dates" for an inspection, and asking Edgerly to put "in writing, what existing conditions you are concerned about that would require such a visit." Edgerly responded immediately with a letter dated July 13 1995, in which he referred to pending grievances in safety and repeating his request for dates for an inspection "to make sure our members are working in a safe and healthy environment. Friedman did not respond until July 27, when he sent a letter in which his accused the Union of retaliating against the Company due to the State of contract negotiations, and asking to be informed. "Why the visit is necessary, the identity, background and credentials of the person you wish to visit us and your proposal concerning the scope of the visit."

Edgerly did not receive that letter until August 7. He responded immediately with a letter that day in which he rejected Friedman's accusations, and again requested dates. He stated that the Union is entitled "to check all conditions to see that they are safe" and stated that if the Respondent did not supply the Union with dates the Union would have "no alternative but to contact OSHA. I don't think you can refuse them." The Union never got a response to the August 7 letter. As a result, Edgerly contacted OSHA, which then did a safety inspection.

The Respondent offered no evidence at trial as to any reason why the Union should not be able to exercise its rights to have a safety inspection other than the fact that Friedman "smell[ed] something" because See had called him in June protesting the Company's implementation of its contract proposal and told Friedman they were now "at war," and the Union would be calling OSHA and having the International Union conduct safety inspections.

Credibility

In determining the credibility of the respective witnesses, I have carefully considered the record evidence and have based my findings upon my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1972); *V & W Castings*, 231 NLRB 912 (1977); and *Northridge Knitting Mills, Inc*., 223 NLRB 230 (1976). I tend to credit the account of what occurred herein as given by the General Counsel's witnesses. Their testimony was given in a believable and forthright manner, was generally consistent and corroborative of each others, and more importantly consistent with the documentary and other evidence present in the record. In contrast, the testimony of the Respondents' witnesses, was inconsistent at times and I especially found the testimony and demeanor of Leonard Friedman and Sanford Kay to be less than credible.

B. Analysis and Conclusions

The Unilateral Changes

Section 8(a)(5) and 8(d) of the Act obligate an employer to bargain with the representative of its employees in good faith with respect to "wages, hours and other terms and conditions of employment." *NLRB v. Borg-Warren Corp*., 356 U.S. 342 (1958); and *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). Section 8(a)(5) also obligates an employer to notify and consult with a union concerning changes in wages, hours, and conditions of employment before imposing such changes without first giving the union an opportunity to bargain about them. *NLRB v. Katz*, 369 U.S. 786 (1963); and *NLRB v. Pinkston-*

Hollar Construction Services, 954 F.2d 306 (5th Cir. 1994). Such prior notice to the union must be timely so that the union may have a reasonable opportunity to evaluate the proposal and present a counter proposal before the change takes police. *Giba-Greigy Pharmaceutical Division*, 264 NLRB 1013 (1932); and *M & M Contractors, Inc*., 262 NLRB 1472 (1982).

In *M & M Contractors, Inc*., supra, the Board stated:

> [A]n employer, as a part of demonstrating its diligence and good faith must present the union with its detailed contract proposals and permit the union a reasonable time to evaluate the proposals. [Id.]

Moreover, the Board also stated therein:

> When a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, an employer may be justified in implementing unilateral changes in the terms and conditions of employment. See, e.g. *AAA Motor Lines, Inc., 215 NLRB* 793 (1974).

In *Winn-Dixie Stores*, 243 NLRB 972 (1979), the Board indicated that absent extenuating circumstances, an employer must bargain to impasse prior to implementing unilateral changes in working conditions as supported by the Supreme Court's Statement in *NLRB v. Katz*, supra, that:

> [w]e hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.

The Board continued at page 974, "We conclude, however, that the requirement that the parties reach impasse before a unilateral change may be lawfully implemented, rather than merely discuss a proposed change, is in accord with the basic terms established by the Court in *NLRB v. Katz* . . . ."

Determination of whether an impasse exists, in turn, is usually dependent upon whether there is a "realistic possibility that continuation of discussion . . . would have been fruitful." *Television Artists AFTRA (Taft Broadcasting Co.)* v. NLRB, 395 F.2d 622, 628 (D.C. Cir. 1968). Yet, before the issue of impasse becomes ripe for resolution, there first must be meaningful negotiations which can be assessed to determine if continued discussion "would have been fruitful." Thus, a genuine impasse . . . is merely a point at which the parties cease to negotiate," *Hi-Way Billboards, Inc*., 206 NLRB 22, (1973), reversed on other grounds 500 F.2d 181 (5th Cir. 1974); or when negotiations reach the point at which the parties have exhausted the prospects of concluding an agreement, *Laborers Health & Welfare Fund v. Advance Lightweight Concrete*, 484 U.S. 539 (1983).

Moreover, where an employer has been rebuffed over a prolonged period in its efforts to diligently and earnestly seek bargaining sessions, and, at least, demonstrates that a valid economic reason exists for instituting changes already submitted to the bargaining representative as proposals, no violation of the Act is committed by implementing those proposals, absent evidence showing that an unlawful motive existed for having done so. *M & M Contractors*, supra; *AAA Motor Lines, Inc*., supra; and *Mountaineer Excavating Co.*, 241 NLRB 414 (1979).

Additionally, as the court notched in *NLRB v. Auto Fast Freight*, 793 F.2d 1126, 1129 (9th Cir. 1986):

> There exists a narrow exception to the bargain to impasse rule: where, upon expiration of a collective-bargaining agreement, the Union has avoided or delayed bargaining, and the employer has given notice to the Union of the specific proposals the employer intends to implement, the employer may unilaterally implement the proposals without first bargaining to impasse, *Stone Boatyard v. NLRB*, 715 F.2d 441, 444 (9th Cir. 1983), cert. denied 466 U.S. 937. . . . (1984). Accord: *M & M Building & Electrical Contractors, Inc*. 262 NLRB 1472, 1476–1477 (1982).

Consistent with that exception is the obligation of the parties not to seek to stretch out negotiations by whatever strategy. *Southwestern Portland Cement Co*., 289 NLRB 1264 (1988), *Eastern Maine Medical Center*, 253 NLRB 224, 247 (1980). In this regard, the Board has also recognized exceptions to the general rule that prohibits an employer from proceeding with changes until an overall impasse is reached; when the Union insists on continually avoiding or delaying bargaining or when "economical exigencies" require prompt action and the employer has given the Union notice of the proposals it intends to implement and made "diligent and earnest efforts" to engage in bargaining. *Southwestern Portland Cement Co*., supra; *M & M Building & Electrical Contractors, Inc.*, supra; *Stone Boatyard v. NLRB,* supra; *Fire Fighters*, 304 NLRB 401 (1991); *Bottom Line Enterprises*, 302 NLRB 73 (1991*);* and *Serramonte Oldsmobile*, 318 NLRB 1 (1995).

Also, in *Caravelle Boat Co*., 227 NLRB 1355 (1977), the Board quoted *Taft Broadcasting Co.*, supra.

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the State of the negotiations are all relevant factors.

Impasse is a defense to the charge of unilateral change. It must be proved by the party asserting impasse—in this case the Respondent. *North Star Steel Co*., 305 NLRB 45 (1991); and *Sacramento Union*, 291 NLRB 552 (1988).[18]

The Respondent asserts in its brief that the above principles apply in this case and that it met the Board's standard for bargaining. The Respondent states that the Company gave the Union notice of its lack of competitiveness in the wheel cylinder product and the possibility that it would subcontract their work unless cost savings could be achieved. The Respondent then maintains that 8 months lather the Union still failed to make any proposal and to engage in meaningful bargaining. "In fact, the Union repeatedly asserted that it had no intention of doing so." Even Union Agent DeCastro concluded that the Local Union was stalling the bargaining process.[19] The Re-

[18] Unlike the requirement for an impasse defense that both parties perceive their bargaining to be at a point of deadlock, in analyzing the validity of a dilatory bargaining defense, "a single party's perception of the other party's tactics is a relevant consideration in determining whether unilateral implementation is lawful." *Southwestern Portland Cement Co*. supra.

[19] However, according to the testimony herein of the General Counsel's witnesses, what DeCastro was saying was that he perceived the

spondent adds that "the Union's only response was that the Company's proposals were 'unrealistic'. It is the Respondent's position that continued bargaining with the Union would not have resulted in an agreement and that therefore impasse existed between the parties."

a. Subcontracting unit work and resulting layoffs

The consolidated complaint alleges that since about March 6, 1995, the Respondent subcontracted work normally performed by unit employees, and has laid off unit employees as a result of that subcontracting in violation of Section 8(a)(1) and (5) of the Act.

The record evidence show as that the Respondent notified the Union of its noncompetitive position in its wheel cylinder business. The Respondent also supplied the Union with requested information regarding its need for financial help. After examining the Respondent's financial records UAW Auditor DeCastro reported to the Union that the Respondent was experiencing serious problems in the wheel cylinder department and concluded that cost reductions should be considered by the Union. Moreover, the Respondent informed the Union that if it did not achieve cost reductions by February 28, 1995, it would be required to subcontract its wheel cylinder work out. However, the record evidence herein does not support the Respondent's assertion that the Union actually engaged in "stall tactics" during this period.[20]

The Respondent in its brief asserts that the Union had no intention of offering any economic proposals in response to the Respondent's request for labor cost savings to avoid subcontracting wheel cylinder work; that the Respondent made every effort to nether into meaningful negotiations; that the contract language in the Connecticut Operations Agreement permitted subcontracting of the wheel cylinder product line; and that the Respondent met the Board's standards and was authorized to proceed with its plans. Except for the fact that the contract language of the Connecticut Operations Agreement did permit subcontracting of the wheel cylinder line, I do not agree with the Respondents' contentions.

Clearly, both subcontracting and layoffs are mandatory subjects of bargaining. *Davis Electric Wallingford Corp*., 313 NLRB 375 (1995); and *Public Service Co*., 312 NLRB 459 (1993). The Respondent was therefore obligated to bargain about the subcontracting which it engaged in beginning about February 1995, and the layoffs, which resulted.

The Respondent in its brief states that the *Traditional Taft Broadcasting Co*., 163 NLRB 475 (1967), enfd. 395 F.2d 662 (D.C. Cir. 1968), impasse standards had also been met. The Company established a reasonable "target" of cost savings. The Union continuously throughout the course of bargaining stated that the Company was not realistic and the Union would not agree to anything like its proposals and would not even make a counterproposal. When it is clear that continued bargaining would not have resulted in an agreement, "impasse exists." However, the Respondent has failed to sustain its burden of establishing that impasse existed when it subcontracted the unit work. At the time the parties were negotiating for a successor labor agreement, had only met six times, and the Union had not even put forward an economic proposal. Negotiations in fact continued on March 9, 1995, immediately after the Respondent announced on March 6 that it had subcontracted unit work, and that such subcontracting was "not cancelable." When subcontracting of the wheel cylinder work occurred there is no evidence that there was a "realistic possibility that continuation of discussion . . . would [not] have been fruitful." *Television Artists AFTRA (Taft Broadcasting Co.) v. NLRB*, supra; and *Caravelle Boat Co.*, supra.

The record in this case is also insufficient to show that there were extenuating circumstances justifying the unilateral changes at issue. Neither does the record evidence support any defense based on the Union's waiver. The Respondent appears to be asserting that its actions were somehow justified by economic exigencies. While the evidence does show that the Respondent was suffering serious economic losses possibly since June 1994 and thereafter, the Respondent's own conduct raises the question as to whether it viewed the problem as requiring immediate attention. Friedman claimed in his March 6 letter that "we have no choice, if we are to save any business, but to take steps immediately to cut our losses." Moreover, he claimed that "we feel we have no other choice but to proceed with our plans as permitted by our Letter of Agreement." There is no dispute that the Respondent had a problem with price competition in its wheel cylinder and master cylinder product lines resulting in serious financial loss. It knew of this problem since June 1994. The Respondent had a contractual procedure to be followed when confronted with such a competitiveness problem, the Connecticut Operations Agreement, but the Respondent chose not to follow that procedure, instead seeking a new collective-bargaining agreement, knowing that the Union had rejected any early deadline for such negotiations. It consciously chose that path because it appears to have been more concerned about the long-term solution rather than achieving short-term cost savings. The only explanation in the record for its February 28, 1995 deadline, was that it wanted to have an outside source of wheel cylinders at the time the existing contract expired in case of a work stoppage by the Union. That reason, preparing for a possible strike, is simply not the kind of exigent circumstances that justifies unilaterally transferring unit work.[21]

Neither does the record evidence support any defense based upon the Union's waiver of its rights. A union may waive its rights by a complete failure to respond to a proposed unilateral change by requesting bargaining about it. *Haddon Craftsman, Inc.,* 300 NLRB 525 (1990)*; and Jim Walter Resources, Inc.* 289 NLRB 1441 (1986). However, the Board has held that a waiver of bargaining rights is not to be lightly inferred and must be clear and unequivocally conveyed. *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983); and *Caravelle Boat Co.*, supra. The notice given of a proposed change must be sufficient to give the union a "meaningful opportunity to bargain."

Respondent's economic problem as serious and that *it would not* be in the Union's best interest to *engage* in stalling tactics, not that *it was* actually engaging in stalling tactics.

[20] While Paulus testified that during a conversation with DeCastro in lathe August 1995 wherein DeCastro told him that "he had advised the Union that we were in trouble and that it was not advisable to go into any further stall tactics," in his written memo of a phone conversation between himself and DeCastro, on October 17, 1995, Paulus states that DeCastro Stated that he advised the Union that our problems would not just go away and "that delay tactics aren't in the best interest." Despite the ambiguity, the record evidence itself does not support the fact that the Union engaged in "stall tactics" as asserted by the Respondent.

[21] As admitted in the Respondent's brief, "Subcontracting the wheel cylinder work did not resolve the problem but it reduced the hemorrhaging."

Haddon Craftsmen, supra at 790. Here the parties, in effect, had commenced bargaining regarding the issue of the need to subcontract the work.

As stated in *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1982);

> The Board has long recognized that where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a fait accompli.

Further, notice of the proposed changes must adequately set forth what the changes entail, as well as grant sufficient time to bargain. *GRH Energy Corp*., 294 NLRB 1011 (1989).

Moreover, waiver will rarely be found where parties are engaged in collective bargaining for a collective-bargaining agreement. *Bottom Line Enterprises*, 302 NLRB 373 (1991), states:

> When negotiations are not in progress, we can find a waiver of a unions right to bargain over a change in the unit employees terms and conditions of employment on the basis of the union's failure to request bargaining if the union had clear and unequivocal notice of the proposed change and was given that notice sufficiently in advance of implementation to permit meaningful bargaining. However, when, as here, the parties are engaged in negotiations an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse had been reached on bargaining for the agreement as a whole. The Board has recognized two limited exceptions to this general rule. "[When] a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining," and when economic exigencies compel prompt action.

See also *Fire Fighters*, 304 NLRB 401 (1991); and *Daily News of Los Angeles*, 304 NLRB 511 (1991).

Nor can the Respondent justify a claim of union waiver as the Union gave the Respondent the choice of two paths, and it was the Respondent who chose to negotiate for a new collective-bargaining agreement. There was never any decision bargaining as contemplated by the Connecticut Operations Agreement, much less any competitiveness committee formed as required by that agreement. The Respondent asked the Union for early contract negotiations and the Union agreed to it. After six sessions the Respondent was clearly unhappy with the progress of those negotiations so it unilaterally subcontracted unit work and laid-off employees. Such conduct is simply not decision bargaining. The Respondent, prior to its March 6 announcement, never informed the Union which specific product it was planning to subcontract, how much of that product, or that it would lay off employees or how many employees or how much it thought it could save by subcontracting and layoffs. At trial Kay acknowledged that the Respondent did not think it would save $1.7 million by the subcontracting and layoffs. Therefore, the record is absolutely barren of any of the details that would have been the subject of actual decision bargaining, where the Union would have had a right to know all such facts precisely in order to bargain about the Company's decision.

Additionally, the Union did not waive its right to decision bargaining by entering into The Connecticut Operations Agreement itself. There simply is no hint of waiver of the Union's statutory rights at all in that agreement, much less a "clear and unequivocal" waiver as would be needed. See *Public Service Co*., supra at 461. Nor can the Respondent argue that the Union waived it rights somehow by trying to arrange to have Bruce DeCastro meet directly and privately with the Respondent's production managers. The Union did not break off negotiations, or even threaten to do so. but instead attempted to find an alternative way to assist the parties by bringing in its expert from Detroit who was specialized in helping such troubled companies.[22]

It appears that Instead of engaging in decision bargaining over the subcontracting and layoffs, the Respondent instead used the threat of subcontracting, and its implementation, as weapons in order to achieve a new contract on its own terms. Threatening unspecified unilateral changes during the course of collective bargaining for a new contact is not only not bargaining in good faith, it is not bargaining at all with regard to the subject of the threat, the decision to subcontract.

It is undisputed that the Respondent retained rights under the Connecticut Operations Agreement, but it did not, by choosing it's course of action, achieve any greater rights, nor lessen any of its obligations, under that Agreement. On the other hand, by agreeing to the Respondent's request for early contract negotiations, the Union did not waive any rights that it had under the Agreement. Had the Respondent decided in March 1995 that the early contract negotiations were not achieving its objectives, it could simply have, invoked the Connecticut Operations Agreement, and followed the steps in that Agreement. In particular, it could have engaged in decision bargaining but did not do so, and it has not established any of the affirmative defenses to its unilateral conduct.

Moreover, the Respondent had actually already implemented its decision to subcontract in February, thus presenting a fait accompli to the Union and union waiver is not available as a defense under such circumstances. *Ciba-Geigy Pharmaceuticals Division*, supra. As the Court of Appeals for the Fifth Circuit stated in *Gulf States Mfg. v. NLRB,* 704 F.2d 1390 (5th Cir. 1983*).*

> It is . . . well established that a union cannot be held to have waived bargaining over a change that is presented as a fait accompli . . . . "An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity to counter arguments or proposals." . . . Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated.

From all of the above, I find and conclude that the Respondent violated Section 8(a)(1) and (5) of the Act when it unilat-

[22] The Respondent asserts in its brief that DeCastro's efforts to meet with specific representatives of the Respondent "bypassing the Company's representatives" was an unfair labor practice. See *Medo Photo Supply v. NLRB*, 321 U.S. 678 (1944). I do not agree. This was only a suggestion by the Union to assist in resolving issues, it did not actually occur when the Respondent refused consent, and, in fact, the Respondent's representatives main negotiators met with the Union's negotiating committee without the consent of the Union's main negotiator, See, and without his knowledge.

erally subcontracted unit work and by laying off employees as a result of that decision.

b. The implementation of the Respondent's final offer

The consolidated complaint alleges that since about June 26, 1995, the Respondent has implemented the terms and conditions of its last proposal for a collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act.

The Respondent implemented its last offer to the Union on June 26, 1995, raising the defense of impasse to justify its unilateral action. Impasse occurs when negotiations reach the point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health & Welfare Fund v. Advance Lightweight Concrete*, 484 U.S. 539 (1983). After bargaining to impasse, an employer may make unilateral changes, as long as the changes are reasonably encompassed by the employer's preimpasse proposals. *Western Publishing Co*., 269 NLRB 385 (1984). Furthermore, after impasse had been reached on one or more subjects of bargaining, an employer may implement any of its preimpasse proposals, even if no impasse has occurred as to those particular proposals which are put into effect. *Taylor-Winfield Corp*., 225 NLRB 457 (1976); and *Taft Broadcasting Co*., supra.

As indicated above, the bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered in determining whether or not impasse has been reached. *Taft Broadcasting*, supra. As the Board stated in *Hi-Way Billboards, Inc*., supra at 23:

> A genuine impasse in negotiation is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

In addition to the traditional *Taft* analysis, the Board has recognized that impasse also exists when the union has avoided or delayed bargaining and the employer has given notice of the proposals it intends to implement. See *Southwestern Portland Cement Company*, supra; *M & M Building and Electrical Contractors, Inc.*, supra; *Stone Boatyard v. NLRB*, supra; *Fires Fighters*, supra; *Bottom Line Enterprises,* supra; and *Serramonte Oldsmobile, Inc.*, supra.

The Respondent asserts that an analysis of the overall negotiations show as that the Union consciously sought not to reach agreement for a collective-bargaining contract. This is not supported by the record evidence.

Moreover, the circumstances alluded to in the Respondent's brief as evidence of the Union's asserted conscious effort to avoid reaching an agreement are not substantiated in their negative aspect attributed to them to support its assertion. For example: Union representative See's admission that he didn't look forward to presenting to the Union's membership proposals which might require a reduction in their wages and benefits (an understandable feeling on his part) but he did so; DeCastro's advice to See that in view of the Respondent's problems, the Union should not consider engaging in any delay tactics (it is unclear in the record as to whether the Union was actually doing so at the time as evidenced by Paulus' testimony as to this and his written memo of a lather conversation with DeCastro); the Union's alleged commission of an unfair labor practice "in making repeated "efforts to bypass the designated Company representatives "(while DeCastro sought to met with Company officials without the presence of the Respondent's designated bargaining representatives, this was never made a condition of the Union's continuing to bargain with the Respondent, never took place in any event and, instead, in fact, the Respondent's representatives met with the Union's bargaining committee without the presence of See, its main negotiator); during the period from January 11, to March 9, 1995, while the Union repeatedly stated to the Company that its proposals were unrealistic, however, the Union never used its belief in this nature to discontinue negotiations or to bargain offering its own counterproposals toward a bargaining agreement; the March 10, 1995 incident, where the Respondent's representatives caucused shortly after the meeting commenced and after not coming back for a few hours, it found that the Union representatives had gone to lunch "with no notice," (an apparent mix up in communication between the parties adequately explained in the record) after which, the Respondent then concluded the meeting in apparent anger, and despite the above the Respondent admits in its brief that "[t]he parties continued to meet and discuss economic proposals as well as the proposals offered by the Union during meetings in April 1995."

Additionally, according to the Respondents own brief, the parties continued to negotiate and discuss proposals from May 1, 1995, on. For example: on May 1, 1995, Friedman detailed the Respondent's response to the Union's "51 proposals" presented; the Union's proposal was discussed during the May 4 and 5 meetings; on May 22, 1995, the Union "reiterated" its position that the Union's offer would not amount to the $1.7 million savings sought by the Respondent, on May 24, 1995, the Union revised its "regressive" proposal to add additional holidays and on May 30, 1995, reiterated its position that the Respondent's economic proposals were unrealistic; on May 31, 1995, the Respondent's economic proposals were discussed and each party rejected the economic proposals of each others; on June 1, 1995, the parties presented their final proposals with the Union informing the Respondent that it would not recommend the Respondent's offer to the union membership for approval (the record evidence indicates that only the Respondent's proposal was in the nature of a final offer), etc. There were exchanges of letters between the parties from June 2, 1995, to about June 25, 1995, in which the Respondent declared an impasse in negotiations. The above are set forth in more detail hereinbefore.

Under the circumstances present in this case, I do not find that the Respondent has sustained its burden of establishing that an impasse was reached in the negotiations at the time that it was apparently declared on June 14, 1995.

It is well settled that for impasse to be found the parties must have reached "that point of time in negotiations when the parties are warranted in assuming that further bargaining would be futile." *Patrick & Co.*, 248 NLRB 390 (1980). In considering the factors necessary to find that a bargaining impasse exist, I find that the prior bargaining history and the parties agreement in the past and present for the early opening of negotiations for a new successor bargaining agreement does not favor a finding of impasse. *Alsey Refractors Co.*, 215 NLRB 783 (1974). Further, the negotiations were held over a period of several months and serious and important issues remained open at the time the Respondent implemented its final offer. Moreover the

movement of the Union in this case especially just prior to June 14, 1995, does not justify the Respondent's conclusion that the parties were deadlocked. *Old Man's Home of Philadelphia*, 265 NLRB 1632 (1982).

Clearly, the Union did not believe negotiations were at an impasse. Further, there is sufficient objective evidence to justify its belief. The Union made its first serious economic proposal right before impasse was declared, including a 5-percent reduction in wages, and which by the Respondent's own estimation was valued in total at $650,000. The Respondent itself moved that day in response to the Union's movement, and inter alia, dropped its wage cut proposal from 10 to 8 percent. Moreover, in the Union's last offer on June 1, it indicated that it would accept a two-tiered wage system, and made a substantial movement with regard to vacation pay. On the contrary, the Respondent valued its own final offer at about $1.35 million, down from $1.7 million, and the meeting closed with the Union expressing a willingness for the first time of accepting the Respondent's MOST system with certain conditions. There simply was no objective basis for finding impasse at that time.

Furthermore, it is important to note that the Respondent had described its new group bonus system, including MOST, as one to the "linchpins" of the whole bargaining process, yet Friedman admitted that it was not even finalized on June 1. The Union had serious questions and reservations about what had so far been presented to it, but was making serious movements towards accepting it. Moreover, the fact that the Respondent dramatically changed its productivity and wage proposals on May 22 further militates against a finding of impasse. Having waited so long to make its "linchpin" proposal, it was incumbent on the parties to explore these new areas fully and those remaining to be decided. See *Herman Bros. Inc*., 302 NLRB 724 (1992).

The Respondent claimed that it regarded the Union's second proposal on June 1 as being regressive. It did not, however, seek to ask questions about the ambiguities it professed to perceive. Moreover, it was the Respondent who put forth the last proposal that day, one which they estimated at about $1.35 million. Thus, the final note of the day continued to be one of further movement. Additionally, the claim that the Union was being regressive on June 1 is not borne out by the most conservative analysis of the Union's proposals. Totaling the Union's concessions in that first offer, while not even giving any credit for its proposal to eliminate "red-circles" after 3 years amounts to $556,012. However, if credit is given for eliminating red-circles, the figure is significantly greater and totals $790,302.

In the Union's second proposal, there was an ambiguity as to whether the Union still included washup time. Assuming it did not, the Union's second proposal was still greater than its first because the Union added a two-tiered wage proposal ($125,267); eliminated 1 sick day ($28,969); and eliminated the 5th week of vacation, while substituting bonuses, which proposal Kay valued at $27,000. Thus, even if washup time was not included ($144,844.) then the total of the Union's second proposal was $572,024. If it was to be included, while not counting red-circles, its proposal was worth $716,868. If red-circles, were included, the total would have been $951,158. It is also significant to note that the Respondent was itself making movement on the red-circles, and in its last proposal had offered to keep them for a year. Thus, the parties were in agreement on removing red-circles, and had narrowed their differences down to 2 years as to when that removal would be made effective.

Thus, no matter how one analyzes the Union's second proposal, the Union was clearly moving in areas of importance, and in the direction of the Respondent. The Respondent itself was moving towards the Union. The declaration of impasse was simply premature, as there were many areas in which to explore continual movement. Instead, the Respondent declared impasse, and has not shown any desire to seriously negotiate since.

In *Cal-Pacific Furniture Mfg. Co.*, 228 NLRB 1337 (1977), the Board found that the willingness to make further concessions in some areas suggested a willingness to make further concessions in order to reach agreement. The other party is not justified in concluding that negotiations are at an impasse simply because concessions have not been made in the area it finds most crucial or the concessions themselves have not been sufficiently generous. The union's concessions were significant enough to reasonably suggest that further concessions might be forthcoming and the Respondent's conclusion that a deadlock existed in the face of the union's concessions is unwarranted. *Old Man's Home of Philadelphia*, supra.

In these circumstances, I find and conclude that the parties were not at impasse when the Respondent unilaterally implemented its last contract proposal, and that the Respondent's action, therefore, circumvents the duty to bargain in violation of Section 8(a)(1) and (5) of the Act.[23]

Also, although an employer who has bargained in good faith to impasse normally may implement the terms of its final offer, it is not privileged to do so if the impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations. *Noel Corp.*, 315 NLRB 905 (1994); *Columbia Chemicals Co.*, 307 NLRB 592 fn. 1 (1992), enfd. mem. 993 F.2d 1536 (4th Cir. 1993); *J. W. Rex Co*., 308 NLRB 479 (1992), enfd. mem. 998 F.2d 1003 (3d Cir. 1993). Therefore, the Respondent was also not in a position to declare impasse. The Respondent's decision to subcontract and layoff employees which I found herein to be a violation of Section 8(a)(1) and (5) clearly and dramatically effected the parties negotiations.

Once the Respondent announced that it was subcontracting wheel cylinders and planned to lay off 51 employees, negotiations were affected. As See stated, "[T]he Union felt they were holding a gun to our head over this issue." The following meetings in March were encompassed discussions over the subcontracting, or else broke down completely, with the Respondent leaving the meeting on March 10, and refusing to meet at all on March 15. The March 21 meeting continued bickering over why the Respondent refused to meet on March 15. The March 29 meeting was delayed because of the Respondent's initial

[23] The Respondent asserts in its brief that:

> The Administrative Law Judge should recognize that the Company's economic circumstances of losing $5 million since discussions began in June 1944 made it clear that it was not going to agree to any proposal which did not include serious and valid cost reductions. The Union proposal did not do so. The Union clearly did not intend to reach agreement with the type of cost savings the Company was looking for. Virtually all of its proposals contained clearly unacceptable contingencies which it knew the Company could or would not accept.
>
> This would appear to be the Respondent's assessment thereof and suggests that the Respondent's approach to bargaining with the Union was for the Union to accept an agreement on its terms or no agreement at all.

refusal to meet with a mediator present. When the parties met that day, the meeting broke down again in mutual recriminations with See asking the all-too-relevant question. "What good is it to negotiate $1.7 million if you're going to lay off people?" The Respondent's sense of urgency seems to have dissipated and there were only two meetings in April, one of which, April 12, entailed effects bargaining.

On May 1, the Respondent submitted a list of revised proposals which Friedman described as "must be included if we are to reach agreement." The list totaled more than $2.1 million. Moreover, the letter informed the Union that it would be presenting a revised productivity proposal on May 22, just 8 days prior to the end of the contract. When the Union informed Friedman on May 5 that the Union was not prepared to meet with H.P. Maynard's representative on May 22 because Trull could not be present, the Respondent announced that there would be no more negotiations until the Union did meet with H.P. Maynard. Moreover, the Respondent broke off negotiations on May 5 because it no longer wanted to review the Union's proposals. The pattern seems unmistakable—once the Respondent announced its decision to subcontract and lay off employees, its consistent demeanor was one as See accurately described, "it was their way or the highway."

This conduct persisted throughout the remaining negotiations. When the parties met again on May 22, the Respondent now demanded a group bonus incentive system to replace the existing individual based incentive, and demanding a wage reduction of 10 percent, an average of $1.31 per employee, which was a dramatically deeper cut from the 50 cents per employee previously on the table. When the Union submitted questions on June 6 concerning this complex new system the Respondent's effective response was to immediately declare impasse on June 14.

Moreover, when the parties reached dramatic progress on June 1, the Respondent failed to ask questions they claimed to have had to better understand the Union's proposals. The evidence indicates that the Union and the Respondent had closed the gap between them by about a minimum of $900,000—$1 million, which was well over 50 percent of the $1.7 million originally sought, and the gap may actually have been even smaller than that. The inference is inevitable that the Respondent had in fact once again changed its demands, and further negotiations might have disclosed that fact. Proof of that is shown by its conduct on June 16, for when the Union once again increased its wage reduction proposal from 5 to 6 percent which meant that, as Kay described in, "hard" money the Union and Company had closed the gap between their proposal down to 2 percent as the Company sought 8 percent. That meant they were only $100,000 apart on the wage proposal after starting off over $500,000 apart. The Respondent rejected the proposal on the basis that the Union conditioned its proposal on bringing back the subcontracted work and claimed that was regressive. Yet all along the Respondent had told the Union that if the concessions were achieved, the work would be returned.[24]

[24] Kay and Friedman claimed that by the use of the word "all," the Union's proposal was ambiguous, and could be interpreted to mean work which had always been subcontracted, but they did not bother to ask for an explanation. The General Counsel in his brief poses that the Respondent did not want a clarification because it intended to reap the financial savings of its layoffs and subcontracting, and still demanded deep cuts from the Union, but did not want to have to disclose that.

The lack of the Respondent's interest in reaching agreement was conclusively shown by its refusal on July 13 and thereafter to even tell the Union how much it was seeking in concessions. Any question about the Respondent's position became clear when on August 29, 1995, it informed the Union that the figures the parties had relied on since February 1, 1995, the figures prepared by the Respondent for negotiations were no longer valid, because of the massive decrease in unit employees, a decrease almost exactly forecast in Friedman's March 6 letter of 51 employees. It had in fact unilaterally implemented those concessions.

The record evidence illustrates that the Respondent began a process in June 1994 in which it linked the prevention of increased subcontracting of its products to achieving major contractual concessions from the Union. When it went forward and unilaterally subcontracted, prior to impasse, the negotiations were permanently adversely affected, and the previous ground of these negotiations, the preservation of unit work, shifted. A review of the entire record conclusively establishes that the subcontracting of unit work, and the concomitant layoffs, did "seriously affect the negotiations." Accordingly, the parties were not at legal impasse and the Respondent was not privileged to declare impasse as it did on June 14, 1995, and to unilaterally implement its contract proposals on June 26, 1995. By so doing the Respondent violated Section 8(a)(5) and (1) of the Act.

c. The implementation of the Respondent's Group Incentive Bonus Plan

The consolidated complaint alleges that about October 30, 1995, the Respondent implemented a new group incentive bonus plan in violation of Section 8(a)(1) and (5) of the Act.

As found hereinbefore, no lawful impasse had been reached at the time the Respondent unilaterally implemented its last contract offer. Since the Respondent implemented its new group incentive bonus plan system as part of its final offer this violated Section 8(a)(5) and (1) of the Act since no lawful impasse had been reached at the time it was implemented. What the Respondent presented to the Union in September 1995 was different in fundamental ways from what had been presented in May 1995. Even Friedman admitted that the plan had not been finalized on June 1, 1995. The Respondent was not privileged to go forward and unilaterally "finalize" the plan without giving the Union the opportunity to bargain about it. When an employer changes its bargaining proposal, it must give the union a meaningful opportunity to negotiate about the new proposals and to provide the Union a basis for understanding it. *Herman Bros.* 307 NLRB 724 (1992). The Respondent refused to do so in this case.

The Respondent also asserted a contractual right to implement. However, no contract existed. Even assuming that under the expired contract the Respondent would have been able to implement some of the changes in the incentive system, any alleged waiver of union rights to bargain over such changes contained in that contract, expired along with the contract and the Union, by its conduct, did not waive its right to bargain. The Respondent cannot assume the right to act unilaterally by changing terms and conditions of employment based on a waiver in the expired contract. Moreover, "The Board requires waiver of bargaining rights under Section 8(a)(5) to not be lightly inferred, but must be clear and unmistakable. Such waiver by the Union was not present in this case. See *Our*

Lady of Lourdes Health Care Center, 306 NLRB 337, 339–340 (1992); and *Central Services*, 303 NLRB 381, 484 (1991).

Moreover, the Respondent's proposal of May 22, 1995, called for giving the Company broad discretion to establish standards and "reasonable allowances." As Trull testified, the whole question of what standards are, and how they are implemented, are at the heart of an incentive system. While the Union clearly could have agreed to such a system, thereby waiving its rights to negotiate over any changes in those standards, it did not do so. No agreement was ever reached.

Further, See's expression of willingness to accept MOST with certain conditions made at the end of negotiations on June 1, in the context of trying to achieve an agreement, did not constitute an '"agreement" in the sense of a collective-bargaining agreement, or a waiver of its right to bargain. See's June 6 letter would dispel any notion that the Union had waived any rights to bargain, much less that it had agreed to the Respondent's proposals. Thus, when the Respondent implemented its new incentive system, with new allowances and standards incorporated therein, it was in effect claiming to have implemented a system which gave it the unilateral discretion to set such standards and allowances. The Board had held that Respondent cannot unilaterally implement a system giving it such broad discretion over a mandatory subject of bargaining, even if a lawful impasse existed. *McClatchey Newspapers, Inc*., 321 NLRB 1386 (1996); and *Central Services*, supra. Accordingly based on all of the above, I find and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its new group incentive bonus system.

d. The Union's request for a health and safety inspection

The consolidated complaint alleges that since on or about July 12, 1995, the Respondent has refused the Union's request for access to its facility for a safety and health inspection in violation of Section 8(a)(1) and (5) of the Act.

In *Holyoke Water Power Co.*, 273 NLRB 1379 (1983), affd. 778 F.2d 49 (1st Cir. 1985), the Board stated:

> Rather, each of two conflicting rights must be accommodated *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2d Cir. 1966). First, there is the right of employees to be responsibly represented by the labor organization of their choice and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with.

In balancing these rights, when access is ordered it "must be limited to reasonable periods so that the Union can fulfill its representation duties without unwarranted interruption of the employer's operations." Id. Health and safety conditions are a term and condition of employment about which an employer is obligated to bargain on request and relevant to the Union's representation obligation. *Minnesota Mining Co*., 261 NLRB 27 (1982). Therefore, the Union has a right to gather information to investigate legitimate grievances and employee complaints including the right to a health and safety inspection of the Respondent's plant. *Holyoke Water Power Co.*, supra.

In this case the Union had been presented with a number of complaints from employees, and sought to have an expert from the International Union do an onsite inspection of the conditions complained about, including an earlier one which had led to a number of employees suffering negative reactions due to noxious fumes in the plant, and slippery oil spots on the work floor, loose wires and unsafe machines. There was no reasonable alternative to an onsite inspection.

The Respondent argues that on June 26, 1995, it announced its intention to implement its final offer and that the Union on the next day threatened to bring in OSHA and an International Union safety expert from the Union "to turn up the heat" and "declaring war" on the Respondent according to Friedman's testimony. The Respondent asserts that a letter from Steven Edgerly, the Union's treasurer requesting "dates during which a health and safety representative from the International Union can come and look into these problems" was issued as part of the Union's retaliatory campaign. Moreover, in an exchange of letters between Friedman and Edgerly, Friedman requested to know the conditions which the Union were alleging were unsafe, the name of the health and safety expert from the Union and the need for the inspection in view of the Union's earlier Statement about "using the International safety representative in retaliation for the Employer's posture in negotiations." Edgerly responded that the Union had "a right to tour the plant to see that [the employees] are working in a safe environment." The Respondent also points to the fact that article 8, section 13 of the collective-bargaining agreement provides for a safety committee which includes union representation.

However, I do not find that this affects the Union's right to have an on-site inspection by an expert from the International Union in view of the testimony that employees had complained about safety conditions in the plant. I am aware of the Respondent's arguments regarding the threat of retaliation by See and that request might be in furtherance of that threat. This appears to be speculation on its part with no evidence in the record actually substantiating this. Be that as it may, the safety of the employees is paramount and while I find that the Respondent must comply with the Union's request, it should be accomplished with the realization of the right of the Respondent not to have its operations interfered with. Therefore the Respondent should in conjunction with the Union set mutually acceptable and reasonable times providing the Union with access to its facility for a safety and health inspection.

From all of the above, I find and conclude that the Respondent's refusal to provide the Union access to its facility for a safety and health inspection violated Section 8(a)(1) and (5) of the Act.

e. Unilateral changes in the subassembly department and the wheel cylinder department and the creation of a CNC Cell in the wheel cylinder department

The consolidated complaint alleges that the Respondent about August 25, 1995, combined job classifications in the subassembly department and about October 9, 1995, combined job duties and created a CNC Cell in the wheel cylinder department in violation of Section 8(a)(1) and (5) of the Act.

The Respondent alleges that the management clause of the expired collective-bargaining agreement gives it the exclusive right "to introduce new or improved production methods" and the nature of its operations requires changes in manufacturing methods or the institution of new machinery necessitating job changes from time to time. It asserts that the job combinations were treated exactly as always between it and the Union and that the Respondent had given notice to the Union of an intent to make such changes. The jobs were "run" and the parties met in the grievance procedure to resolve the issues. Thus, the parties precisely followed the established procedures of the recently expired labor agreement.

The Respondent maintains that this process was also followed in the subassembly department and in the CNC combination. The Respondent gave notice of the intent to combine certain job classifications in subassembly. Lockhart met with Geoffrion and Geoffrion informed him that the Company would use the same procedure as it had in the past. The Union then filed a grievance proceeding without negotiating the impact on employees. The Respondent's response was that it was following the contract and past practice.

According to the Respondent the same process was followed in the CNC cell. The Union was given notice of a prospective change. Lockhart and Geoffrion met and Lockhart testified that Geoffrion informed him that this job combination was only on an "experimental basis." The Union filed its grievance and the Respondent' responded that this was a "potential" change and it did "not yet know what would happen or if it will actually work." There was about a then day trial period. The Respondent decided not to proceed with the job combination. The Union subsequently requested that its grievance be placed "on hold." The Respondent agreed but took the position that if there was no further action in 30 days the Company would consider the matter settled or withdrawn.

The Respondent also alleges that when it made its final offer, it only sought to change certain provisions (primarily economic) of the contract and did not attempt to modify its management provisions which gave it the right to introduce new and improved production methods. Additionally, the Respondent states that it followed the procedure it had previously established with the Union of first "running" a job and then handle disputes by the grievance procedure and was therefore authorized to proceed with the job combinations.

The Board has held that following the expiration of a collective-bargaining agreement, the terms of its management-rights clause survive as terms and conditions of employment just as the benefit provisions of such an agreement survive. *St. Mary & Elizabeth Hospital*, 282 NLRB 73 fn. 13 (1986); *Cummins Component Plant*, 259 NLRB 456 (1981).

In *Our Lady of Lourdes Health Center*, supra, the Board held that an employer may make unilateral changes in an expired contract where they were contemplated by the quoted provision of the expired contract and are "a mere continuation of the status quo. *NLRB v. Katz*, supra; and *Garment Workers Local 512 v. NLRB*, 512 F.2d 705 (9th Cir. 1996). Whether a change is a permissible continuation of the status quo turns on the degree of discretion involved.

The management-rights clause of the expired contract gives the Respondent the right "to introduce new or improved production methods." This language does not specifically spell out the details of any change that might be made. Quite obviously, then, the changes entailed the exercise of considerable discretion and were not "a mere continuation of the status quo." *Our Lady of Lourdes Health Center*, supra.

Additionally, I conclude that nothing in the expired collective-bargaining agreement constituted a waiver binding on the Union, and that the Union, by its conduct, did not waive its right to bargain over the changes. *Our Lady of Lourdes Health Center*, supra; and *Central Services*, supra.

I find and conclude therefore that the combining of job classifications in the subassembly department and the combining of job duties and the creation of a CNC cell in the wheel cylinder department, without giving the Union an opportunity to bargain about these changes violated Section 8(a)(5) and (1) of the Act.

f. Additional alleged violations of Section 8(a)(5) *and* (1) *of the Act*

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) and (5) of the Act by granting a bonus meal to certain unit employees about July 15, 1995, for achieving production goals and about July 21, 1995, changed its plant rules by providing drinks to employees in working areas.

Testimony herein indicates that the Respondent has a rule which permits water to be used on the plant floor but restricts other beverages. During the summer of 1995 there were an unusual number of excessively hot days. On July 20, 1995, at a meeting of the Joint Company/Union Safety Committee this issue was raised and it was determined that Gatorade stations would be set up when the temperature exceeded 90 degrees, but that the general policy of restricting food and drink on the shop floor would otherwise remain unchanged. Matters relating to health and safety are the subjects of the safety committee discussions and the loss of potassium on hot days was considered a health issue. The use of Gatorade was the Respondent's response to address this concern.

Operations Manager Paulus met with Lockhart and Lockhart told him that employees had been upset about the implementation of the no food and drink policy and that utilizing Gatorade would contradict the policy. According to Paulus, Lockhart did not seek to negotiate over the issue. Thus, on July 21, 1995, the Company issued a notice informing employees that Gatorade would be available at dispensing stations on 90-degree days. The Respondent asserts that this was not inconsistent with similar practices by the Respondent which has regularly supplied other first aid supplies to employees.

On July 13, 1995, Lockhart was also informed that certain employees in hose assembly were going to be offered pizza by the Company. Lockhart said he thought this was a bad idea because there was no contract in place. The Respondent alleges that it had often given minor food items to employees in situations such as the completion of inventory and the achieving of certain department objectives.

The General 'Counsel argues that the Respondent presented the Union with a fait accompli when it changed its rules on food and drink and rewarded employees for achieving standards by giving them a pizza meal. However, once the contract has expired any purported waiver of the Union's right to bargaining regarding such unilateral changes expired with it. *Our Lady of Lourdes Health Center*, supra; and *Central Services*, supra. The General Counsel also asserts that the Respondent may argue that these changes are de minimis. However, giving bonus meals to reward productivity achievements at the time the parties are negotiating over the Respondent's productivity proposals is destructive of the bargaining process. The Respondent's unilateral changes in this connection cannot be separated from its other unlawful conduct, and should not be regarded as de minimus in these circumstances.

The Respondent asserts that the granting of Gatorade to its employees was not a term and condition of employment since it was not related to any employee objective or performance but was simply offered in response to a potential health risk. Moreover, the Respondent asserts that the record indicates that it complied with the bargaining obligations which might exist since the idea of utilizing Gatorade came from the Joint Safety Committee the appropriate forum to discuss such items and "additionally the Union never sought to negotiate over the implementation of the Gatorade Policy. Lockhart simply advised

the Company that he thought it was a bad idea because it appeared to contradict the existing rule." However, the record is unclear as to whether the parties engaged in actual bargaining over the Gatorade policy.

The granting of Gatorade contradicts the Respondent's policy of not allowing food or drink on the plant floor. Moreover, as the Respondent acknowledges this was in response to a potential health risk. Under these circumstances I find that the Gatorade policy related to the terms and conditions of employment requiring the Respondent to refrain from unilaterally changing its policy without first bargaining with the Union.[25] As the Board stated in *Stone Container Corp*., 318 NLRB 336 (1993):

> *Bottom Line Enterprises*, above, stands for the proposition that when parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilaterally discontinuing an established practice extends beyond the mere duty to give notice and an opportunity to bargain, rather, except for certain circumstances not present here, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse had been reached on bargaining for an agreement as a whole.

Additionally, the Respondent's providing pizza for employees in the hose assembly area when they achieved 100-percent productivity was already related to performance or production standards and was a term and condition of employment rather than a gift. *Benchmark Industries, Inc.*, supra.[26]

From all the circumstances present in this case, I find and conclude that the Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally instituted its policy of providing Gatorade to its employees changing its rules on food and drink on the plant floor and by providing pizzas to its hose assembly employees for achieving certain standards without first bargaining with the Union.[27]

IV. THE EFFORTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully unilaterally implemented the terms and conditions of its last proposal for a new collective-bargaining agreement I shall recommend that the Respondent be ordered at the Union's request, to rescind the implemented terms and conditions of employment of its last proposal and reinstate the terms and conditions of employment which existed prior thereto and maintain in effect the terms and conditions of employment in the now-expired collective-bargaining agreement unless the Respondent and the Union bargain to agreement or good-faith impasse, and in the event an understanding is reached embody such understanding in a signed agreement. See *Winn-Dixie Stores*, supra. Further, the Respondent should be ordered to make whole unit employees for any loss of earnings or other benefits suffered as a result of the Respondent's above unlawful action in accordance with the Board's decision in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing* Co., 138 NLRB 716 (1962).[28]

Having found that the Respondent has unlawfully unilaterally subcontracted out work normally performed by unit employees and has laid off employees as a result of that subcontracting, I recommend that the Respondent be ordered to cease subcontracting unit employee work in the wheel cylinder department and on request, bargain with the Union, restore to said employees such work subcontracted since February 1995, and make whole employees for all losses incurred by them as a result of such unlawful action against them from February 1995 to the present with interest as computed in the manner described above. The Respondent should also be ordered to offer immediate and full reinstatement to their former jobs, any employees laid off due to the subcontracting of the work discussed above, displacing, if necessary, any replacements or, if these jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any losses of pay or other benefits suffered as a result of the discrimination against them with backpay computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1980), with interest thereon computed as in the manner prescribed in *New Horizons for the Retarded*, supra.[29]

Having found that the Respondent unlawfully unilaterally combined job classifications in the subassembly department, and combined job duties and created a CNC Cell in the wheel cylinder department, I shall recommend that the Respondent be ordered upon request to rescind such actions and bargain collectively with the Union regarding this. The Respondent should also be ordered to make employees whole for any loss of wages or other benefits resulting from the Respondent's unlawful actions and to reinstate employees to their former

[25] Contrast *Benchmark Industries*, 270 NLRB 22 (1984).

[26] In *Stone Container Corp*., supra the Board held that "the company picnic, the Christmas gift certificate, and the Thanksgiving dinner was not related to any performance or production standards, and thus were gifts rather than terms and conditions of employment.

[27] I am aware that in *Stone Container Corp*., supra, the Board held that "awarding this small amount of food did not rise to the level of a benefit or compensation that required bargaining regarding the giving of donuts, hot dogs or barbecue lunches if there were no lost - time accidents for specified time periods." However, I find that in the circumstances in this case and my finding of other serious unfair labor practices herein, that *Stone Container Corp*., supra and *Benchmark Industries, Inc.*, supra are distinguishable.

[28] In addition, the Respondent shall make its employees whole for any losses resulting from the Respondent's failure to make contractual welfare and pension fund payments in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980) enfd. mem. 661 F.2d 940 (9th Cir. 1981). Interest on any monies due shall be computed in the manner prescribed in *New Horizons for the Retarded*, supra. The method of determining any additional amounts due to benefit funds shall be made as specified in *Merryweather Optical Co*., 240 NLRB 1213 (1979).

[29] Id.

positions before the combining of these job duties or classifications where requested by the Union, with reinstatement to their former jobs where such unlawful action has resulted in layoff or discharge as set forth above. Any backpay due thereunder shall be computed in accordance with *F. W. Woolworth Co*., supra, with interest thereon computed in the manner prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent unlawfully, unilaterally implemented a new group incentive bonus plan, I will recommend that the Respondent, upon notice by the Union, rescind this plan and bargain with the Union regarding any proposed new group incentive bonus plan, and make whole employees for any loss of wages and benefits suffered by them by reason of the Respondent's unlawful action with backpay computed in accordance with *F. W. Woolworth Co*., supra, with interest thereon as computed in the manner prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent unlawfully refused to provide the Union access to its facility for a safety and health inspection I shall recommend that on request the Respondent be ordered to grant access to its facility by the International's Health and Safety representative designated by the Union, for a reasonable period of time sufficient to inspect for health and safety problems and at a time when such inspection does not interfere with the Respondent's operations.

Having found that the Respondent violated Section 8(a)(1) and (5) of the Act by changing its plant rules by providing Gatorade to employees in working areas and by granting a bonus meal (pizza) to certain unit employees for achieving production goals, I shall recommend that the Respondent, upon request by the Union, cease changing its plant rules by providing Gatorade to employees in working areas and granting a bonus meal to certain unit employees for achieving production goals without first bargaining with the Union about this.

Because of the nature of the unfair labor practices found herein, and in order to make effective the interdependent guarantees of Section 7 of the Act, I shall recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, EIS Brake Parts, Division of Standard Motor Products, is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 376 are labor organizations within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by Respondent at its Berlin, Connecticut facility, but excluding office and plant clerical employees, timekeepers, engineering employees, draftsmen, professional employees guards, watchmen, foremen, assistant foremen and supervisors as defined in the Act.

4. At all times since 1962 International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Local 376, (the Union), has been the exclusive collective-bargaining representative of the Respondent's employees in the above appropriate unit pursuant to Section 9(a) of the Act.

5. By unilaterally implementing the terms and conditions of its last proposals for a new collective-bargaining agreement on or about June 26, 1996, without having reached a lawful impasse the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

6. By unilaterally subcontracting work normally performed by unit employees and laying off unit employees as a result of that subcontracting without having reached a lawful impasse and without affording the Union an opportunity to bargain with respect to this conduct, the Respondent has violated Section 8(a)(1) and (5) of the Act.

7. By unilaterally combining job classifications in the subassembly department and combining job duties and creating a CNC Cell in the wheel cylinder department without affording the Union an opportunity to bargain about this, the Respondent has violated Section 8(a)(1) and (5) of the Act.

8. By unilaterally implementing a new group incentive bonus plan without having reached a lawful impasse and without affording the Union on opportunity to bargain with respect to this conduct, the Respondent his violated Section 8(a)(1) and (5) of the Act.

9. By refusing to provide the Union access to its facility for a safety and health inspection without affording the Union an opportunity to bargain with respect to this conduct, the Respondent has violated Section 8(a)(1) and (5) of the Act.

10. By unilaterally changing its plant rules by providing drinks (Gatorade) to employees in working areas; and by granting a bonus meal (pizza) to certain unit employees for achieving production goals without affording the Union an opportunity to bargain with respect to this conduct, the Respondent has violated Section 8(a)(1) and (5) of the Act in each instance.

11. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]